SUPREME COURT
STATE OF WISCONSIN

STATE OF WISCONSIN

Plaintiff-Respondent,

vs. Case No.: 99-3328-CR

DAVID W. OAKLEY, Trial Case No.: 98-CF-206

Defendant-Appellant.

DEFENDANT-APPELLANT-PETITIONER'S BRIEF IN THE SUPREME COURT

KAY & KAY LAW FIRM
BY: TIMOTHY T. KAY
State Bar No: 1019396
COUNSEL FOR
DEFENDANT-APPELLANT-PETITIONER

675 North Brookfield Road
Brookfield, Wisconsin 53045 (262) 784-7110

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

WISCONSIN CASES CITED

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

FEDERAL CASES CITED

WISCONSIN STATUTES CITED

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. **DOES A PERSON HAVE A FUNDAMENTAL RIGHT TO PROCREATE THAT CANNOT BE IMPINGED UPON ABSENT A COMPELLING STATE INTEREST:**

Trial Court answered: "No."

Appellate Court answered: "No."

Oakley states: "Yes."

II. **DID THE COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S CONCLUSION THAT THE DEFENDANT DID NOT PRESENT A NEW FACTOR TO WARRANT A RESENTENCING?**

Trial Court answered: Not decided by Trial Court.

Appellate Court answered: No

Oakley states: "Yes."

III. **DID THE COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S DECISION TO GRANT THE STATE'S MOTION TO WITHDRAW THE PRIOR PLEA AGREEMENT WITH THE DEFENDANT?**

Trial Court answered: Not decided by Trial Court.

Appellate Court answered: No

Oakley states: "Yes."

STATEMENT ON THE CASE

This case is before the Court for Review of an unpublished Court of Appeals decision, dated September 13, 2000 (A-Ap. 101- 106). For purposes of this Brief, Defendant-Appellant-Petitioner, David W. Oakley will hereinafter be referred to as "Oakley". Likewise the Plaintiff-Respondent, State of Wisconsin will hereinafter be referred to as "State".

A. The Nature of the Case, Procedural History and Disposition in Circuit Court.

Oakley is seeking review from the Trial Court's denial of his's Post-conviction Motion to Strike a Condition of Probation and to Modify his Sentence (41:1-6, A-Ap. 107-110) and from the Judgement of Convictions entered in this matter against Oakley (22: A-Ap. 111, 21: A-Ap. 112).

B. Disposition in Court of Appeals.

The Court of Appeals, by way of a unanimous decision, authored September 13, 2000, affirmed the Circuit Court's decision denying Oakley's Post-conviction Motion to Modify Sentence. The Court of Appeals also denied Oakley's claim that the second plea agreement in this matter should have been set aside, concluding that the subsequent plea cured any errors from a first plea that had been entered in this case. Oakley contends that this issue was preserved for appellate relief.

C. Statement of Facts.

On or about May 18, 1998, the Manitowoc District Attorney filed a criminal complaint against David W. Oakley, charging him with nine counts of felony non-support (1:1-5, A-Ap. 113-117). Two counts would

eventually be dismissed upon the filing of the information.

On August 25, 1998, the Oakley appeared before the Court and entered a plea of no contest to count one of the information. Pursuant to a plea agreement, six (6) additional accounts were dismissed, but read in (37:1). The State and Oakley agreed on a joint recommendation of a five year term of probation with an eight year term of prison to be stayed. The Trial Court accepted Oakley's plea and the matter was set for sentencing.

On September 17, 1998, Oakley appeared for sentencing expecting to have the plea agreement previously reached, enforced. The State however, informed the Court that they no longer wished to uphold their end of the plea offer made to Oakley based in part on Oakley's prior conviction from Sheboygan County. (See State v. Oakley, 2000 WI 37, 234 Wis.2d 528, 609 N.W. 2d 786). Over the objections of the Defense, the Court granted the State's Motion to Withdraw the Plea, but indicated it would allow Oakley to file a response (33: 9) this matter was then set for trial on November 9, 1998.

On September 24, 1998, Oakley filed a Letter Memorandum with the Trial Court setting forth his position regarding the State's withdrawal of the plea agreement, (9:1-3, A-Ap. 118-120). Oakley contended that before the Court could vacate his plea agreement, the State must show by clear and convincing evidence that Oakley violated the terms of his plea agreement to a material and substantial degree. Oakley contended that the State had failed to establish those elements and therefore the plea must be allowed to stand.

The Court, by way of a Memorandum Decision, dated November 4, 1998, ruled in favor of the State and allowed the plea agreement to be withdrawn (11:1-3, A-Ap.

121-123). Oakley then filed a Motion for Reconsideration with the Trial Court, (14:1-4, A-Ap. 124-127). The Trial Court did not issue a written decision regarding Oakley's Motion for Reconsideration and therefore, by operation of statute the Motion must have been denied.

On January 13, 1999, Oakley appeared for a second plea and sentencing hearing in this matter. This new "plea agreement" consisted of Oakley entering a plea of other than not guilty to three counts of felony non-support with four counts of felony non-support being dismissed. The State recommended six years of prison consecutive to any outstanding sentence (23:2). A crucial part of the plea agreement required Oakley to agree not to appeal the prior issue of the State withdrawing the previous plea agreement. Oakley contends that although he subsequently agreed to this condition, based on the facts of this case he was left with no other option, as will be further discussed within the legal argument section of this Brief. The Court, subsequently sentenced Oakley to three years of prison time consecutive to the sentence he was currently serving. In addition it was ordered that Oakley would serve an eight year stayed prison sentence concurrent to count one. Oakley was also placed on probation for five years to run consecutive to count one.

As conditions of probation, Oakley was ordered to spend six months in the county jail with 90 days stayed. Oakley was to maintain full-time employment and was ordered not to have any additional children unless he could show to the Court that he had the means to support them (23:29-30). Therefore, as shown should Oakley decide to procreate or exercise his fundamental right to procreate when he did not have the financial means to necessarily support the child, he would be exposing himself to potentially eight (8) years of prison time for exercising his fundamental right.

Judgements of Convictions pertaining to these matters were entered on January 13, 1999, (20),(21).

On or about November 12, 1999, Oakley filed a Post-conviction Motion with the Trial Court alleging that the term of probation prohibiting him from having any additional children while on probation, unless he could show that he had means to support them, was unconstitutional (41:1-6, A-Ap. 128-133). Oakley had also submitted that a new factor had come to light, in that a Dane County Circuit Court Judge had held that transferring inmates to out of state prisons was not supported by state law.

By way of memorandum decision, the Trial Court denied both of Defendant's Post-conviction Motions (43, 44: 1-9, A-Ap. 107-110).

It is from the denial of Oakley's Post-conviction Motions and the subsequent affirmation by the Court of Appeals that Oakley requested the Supreme Court to accept his case for further review.

ARGUMENT

I. THE RIGHT TO PROCREATE IS A FUNDAMENTAL RIGHT THAT A STATE SHALL NOT IMPINGE UPON ABSENT A COMPELLING STATE INTEREST.

A. IT WAS PLAIN ERROR FOR THE CIRCUIT COURT TO IMPINGE UPON OAKLEY'S FUNDAMENTAL RIGHT TO PROCREATE.

"A 'plain error' is one that is 'both obvious and substantial or 'grave'." State v. Vinson, 183 Wis.2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994). "A Defendant's failure to object to a plain error affecting substantial rights does not preclude an Appellate Court from taking notice of the error." State v. Kruzycki, 192 Wis.2d 509, 527, 531 N.W.2d 429 (Ct. App. 1995). Moreover, pursuant to Section 805.18(2) wis. Stats., this error was not harmless:

> No judgment shall be. . . set aside in any action or proceeding. . . for error as to any matter of. . . procedure, unless in the opinion of the Court to which the application is made. . . it shall appear that the error complained of has affected the substantial rights of the party seeking to. . . set aside the judgement.;

See Nowatske v. Osterloch, 201Wis.2d 497, 506-07, 549 N.W.2d 256 (Ct. App. 1996), determining that Section 805.18(2) Wis. Stats., requires a reversal if the result, within reasonable probabilities, might have been more favorable to the complaining party had the error not occurred.

Oakley contends that the condition of probation ordering him not to father any additional children unless it could be demonstrated that he can support them is in fact in violation of the Fourteenth Amendment, Section 1 of the United States Constitution, and Article 1, Section 1 of the

State of Wisconsin Constitution.

The Fourteenth Amendment, Section 1, of the United States Constitution, states as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction equal protection of the laws."

Section 1 of the State of Wisconsin Constitution provides as follows:

> "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights, governments are instituted, deriving their powers from the consent of the governed."

It cannot seriously be disputed that the right to procreate and raise children is a fundamental right which is protected under the due process clause of the Fourteenth Amendment. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Supreme Court recognized that the right "to marry, establish a home and bring up children" is an essential part of the liberty protected by the due process clause, Id., at 399.

In Carey v. Population Services International, 431 U.S. 678 (1977), the United States Supreme Court declared:

> "While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating 'to marriage, Loving v. Virginia, 388 U.S.

> 1, 12 (1967) procreation, Skinner v. Oklahoma, ex rel. Williamson, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S., 453-457; Id at 460, 463-465 (White, J. concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Maier v. Nebraska, 262 U.S. 390, 399 (1923).'" Id., at 685, Quoting Roe v. Wade, 410 U.S. 113, 152-153 (1973).

Actions taken by the State that infringe upon an individuals fundamental rights are subjected to strict scrutiny. Zablocki v. Redhail, 434 U.S. 374, 383 (1978). A reviewing court will engage in a "critical examination" reviewing State action in order to find a compelling reason to support the State's action. Id at 383.

In Zablocki, the United States Supreme Court was asked to review a Wisconsin Statute, Sec. 245.10(1)(4)(5)(1973), which provided that a resident of the State of Wisconsin would not be able to obtain a marriage license unless the applicant could submit proof of compliance with support obligations and could demonstrate that said children "are not then and are not likely thereafter to become public charges" Zablocki at 375.

The Court concluded that while the State's interest in attempting to insure that children were supported was in fact legitimate and substantial, however, concluded that the means selected by the State for achieving those interests unnecessarily impinged on the individuals right to marry. Zablocki at 389. Likewise, the means chosen by the State to insure that Oakley would support any additional children that he should Father unnecessarily impinged on his right to procreate.

The Court's analysis was very direct and conclusive in evaluating the respective viewpoints. The Zablocki Court stated:

> "First, with respect to individuals who are unable to meet the statutory requirements, the statute merely prevents the applicant from getting married, without delivering any money at all in the hands of the applicant's prior children. More importantly, regardless of the applicant's ability or willingness to meet the statutory requirements, the State already has numerous other means for exacting compliance with support obligations, means that are at least as effective means that are at least as effective as the instant statutes and yet do not impinge upon the right to marry. Under Wisconsin law whether the children are from a prior marriage or were born out of wedlock, Court-determined support obligations may be enforced directly via wage assignments, civil contempt proceedings and criminal penalties. And, if the State believes that the parents of children out of their custody should be responsible for insuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders." Id at 390.

The Wisconsin statutory scheme already provides for numerous enforcement tools a State may use. The State may order the issuance of a Wage Assignment pursuant to Sec. 767.265, Stats., the State may place a lien on personal property owned by an individual to enforce support pursuant to Sec. 767.30, Stats., the State may invoke the civil contempt procedures outlined in Sec. 785.03, Stats., and the State may prosecute an individual with a Class E felony for non-support pursuant to 948.22, Stats. This is in fact what happened. Oakley is in fact before this Court on several convictions for felony non-support.

Wisconsin cases have also recognized that procreation is a fundamental right. In Weber v. City of Cedarburg,125 Wis. 2d 22, 370 N.W. 2d 791 (Ct. App. 1985), the Court noted a person's right to privacy recognizing the need for protection against government in matters such as marriage, procreation, contraception, child rearing and education. Id. at 29.

Furthermore, in In re Termination of Parental Rights to AMK, 105 Wis. 2d 91, 312 N.W. 2d 840 (Ct. App. 1981) the Court stated:

> "There is a fundamental right to establish a home and to raise children without governmental interference and, well such right is not absolute, it is a basic right with which the State may not interfere absent a compelling reason for doing so." Id at 106.

Because the right to procreate is a fundamental right, the analysis of Zablocki (supra) is equally applicable to the instant case. Because the condition of probation in question does not serve to rehabilitate Oakley by removing the temptation to commit further crimes, State v. Nienhardt, 196 Wis. 2d 161, 537 N.W. 2d 123 (Ct. App. 1995), nor does the condition serve to separate Oakley from others that could have a detrimental influence upon him, Edwards v. State, 74 Wis. 2d 79, 246 N.W. 2d 109 (1976), the probation condition prohibiting Oakley from fathering further children unless he can show he can support them impinges on his fundamental right to procreate and the means chosen by the State do not promote a compelling State interest.

Therefore, the Court of Appeals erred in affirming the Manitowoc County Circuit Court's refusal to strike as a condition of probation that Oakley not father any additional children unless it could be shown that he could support them.

Because the right to procreate is as much a fundamental right as the right to marry, and a State may only impinge upon a fundamental right for a compelling State reason and the Zablocki case has clearly established that support concerns of a State do not rise to the level of a compelling State interest such as to impinge on the right to procreate, is plain error for the Circuit Court to substantially affect Oakley's right to procreate.

B. It was unreasonable and unnecessary to place upon Oakley a condition of probation that he not Father any additional children unless it could be shown that he could support them.

Section 973.09(1)(a) of the Wisconsin Statutes provides a Circuit Court with "broad discretion to place a convicted person on probation and to impose any conditions which appear to be reasonable and appropriate on that probation." State v. Brown, 174 Wis.2d 550, 553, 497 N.W.2d 463 (Ct. App. 1993) (citing State v. Heyn, 155 wis.2d 621, 627, 456 N.W.2d 157 91990). The Court of Appeals, however, shall not uphold a sentencing Court's discretionary determination of a probation condition if the Circuit Court erroneously exercised it's discretion. State v. Beiersdorf, 208 Wis.2d 492, 502, 561 N.W.2d 749 (Ct. App. 1997).

Ironically, this Court has had the recent opportunity to evaluate conditions of probation placed on this very individual on another matter. In State v. Oakley, 2000 WI 37, the Supreme Court re-emphasized the guidelines which govern conditions of probation. This Court stated:

> "Section 973 09(1)(a) grants a Circuit Court broad discretion in imposing conditions of probation. The Circuit Court may impose, according to Wis. Stats. Sec. 973.09(1)(a), "any conditions that appear to be reasonable and appropriate". Reasonable and appropriate conditions of probation are those that rehabilitate the offender and protect the interest of society. See State v. Heyn,155 Wis.2d 621, 627, 456 N.W.2d 157 (1990); Huggett v. State, 83 Wis.2d 790, 798, 266 N.W.2d 403 (1978)"

The validity and reasonableness of a condition of probation must be measured by how well the condition serves to effectuate the objectives of probation. Huggett v. State, 83 Wis.2d 790, 798, 266 N.W.2d 403 (1978). The

dual objectives of probation are the rehabilitation of those convicted of crime and the protection of the State and community interests. Id. At 798.

Oakley concedes that pursuant Krebs v. Schwarz, 212 Wis.2d 127, 568 N.W.2d 26 (Ct. App. 1997), the Court of Appeals held that a State could impinge upon the Constitutional right of a probationer, if the conditions were not overly broad. In Krebs, the Court held that a condition of probation requiring a probationer to obtain permission from his probation agent before he could engage in sexual activity with a female was reasonable. However, in Krebs, the right to engage in sexual activity was not eliminated but merely restricted. In the instant case, it is very clear that Oakley does not, cannot and probably will never have the ability to properly support children. Therefore, his right to procreate is not restricted but in fact eliminated. Should he violate this fundamental right, as a condition of probation, it is likely his probation will be revoked and he will receive the stayed prison term of eight (8) years.

Oakley believes that this Court's decision in State v. Heyn, 155 Wis.2d 621, 456 N.W.2d 157 (1990) provides the proper framework for analysis. In Heyn, the Defendant was ordered as a condition of probation to pay the costs of a burglar alarm system that was installed in the victim's home. This term of probation was directly related to Defendant's conduct as perpetrated against the victim's. The Heyn Court then went on to state that a condition of probation, which requires the convicted person to payout funds as a consequence of his or her criminal activity must be fairly related to the damage caused by the offender and to his or her ability to pay. Id at 629. Oakley further concedes that Wisconsin case law allows conditions of probation to be imposed against a Defendant that are unrelated to the crime of conviction. In State v. Miller, 175 Wis.2d 204, 499 N.W.2d 215 (Ct. App. 1993) the Court upheld a condition of probation prohibiting the Defendant from having any telephone contact i9wth any woman other than a family

member. The Defendant in Miller had been convicted of burglary and theft charges and a presentence investigation report had indicated that the Defendant had been recently involved in criminality in regards to making sexually explicit phone calls to women. The Miller Court held that it was appropriate to impose a condition of probation that would rehabilitate the Defendant from engaging in criminal conduct.

In another decision, State v. Nienhardt, 196 Wis.22d 161, 537 N.W.2d, 123 (Ct. App. 1995), the Court of Appeals upheld a condition of probation which required a Defendant to stay out of the Town of Cedarburg. The Defendant in Nienhardt had been convicted of making harassing telephone calls to another individual and had argued that the condition of probation was unreasonable. The Nienhardt Court again concluded that the condition of probation would tend to rehabilitate the Defendant from engaging in another form of criminal conduct.

The decisions in Miller and Nienhardt point out that conditions of probation unrelated to the underlying crime of conviction which tend to restrict a Defendant from engaging in either past or potentially future criminality are reasonable and appropriate.

In the instant case, the Circuit Court sought to impose on Oakley's a condition of probation that was clearly not intended to persuade Oakley from engaging in past or future criminal conduct. The exercise of the fundamental right to procreate is not criminal conduct.

As pointed out early within this Brief, the Wisconsin Statutory scheme already provides numerous enforcement tools for the State in an attempt to encourage an individual to satisfy support obligations. Section 973.09, Wis. Stats., is not intended to be a substitute for established mechanisms to collect support. Because exposing Oakley to an additional eight (8) year prison term for exercising a

constitution right to procreate is neither reasonable nor appropriate, the Court of Appeals clearly erred in upholding the Circuit Court's decision in ordering the discretion in upholding the probation condition imposed in this case.

Oakley respectfully requests that this Court correct the error previously committed and reverse the decision of the Court of Appeals and the Circuit Court denying Oakley's Post Conviction Motion to Strike Condition of Probation, and vacate the Order requiring Oakley to show that he can support any additional children that he should desire to Father.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S CONCLUSION THAT THE DEFENDANT DID NOT PRESENT A NEW FACTOR TO WARRANT A RESENTENCING.

Whether a fact or a set of facts is a new factor is a question of law which is reviewed De Novo without difference to the lower Court's decision. State v. Ralph, 156 Wis. 2d 433, 436, 456 N.W. 2d 657, 660 (Ct. App. 1990). Although the decision whether a new factor exists is a question of law, a reviewing Court will overturn a Circuit Court's decision only when the Court erroneously exercised it's discretion. State v. Lechner, 217 Wis. 2d 392, 424, 576 N.W. 2d 912, 944, (1998).

> "A new factor is a fact or a set of facts highly relevant to the imposition of sentence, but not know to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." State v. Franklin, 148 Wis. 2d 1, 8, 434 N.W. 2d 609 (1988).

Oakley contends that by transferring him to an Oklahoma State prison, he has been denied the opportunity to obtain gainful employment so as to satisfy his support obligations. An inmate in an out-of-state prison is not able to obtain work release privileges. Oakley concedes that one Circuit Court 's decision is not binding authority on another Circuit Court as was pointed out by the Trial Court in its decision denying Oakley's Motion (43:1). Oakley contends however that the decision of the Dane County Circuit Court could serve as an influencing factor in this Court's opinion, especially when considered in conjunction with the Court's stated objective and seeking to ensure that the Defendant becomes employed. Oakley was and is a minimum security prisoner and had he remained in Wisconsin he would have been able to obtain work release privileges to begin

satisfying his obligations.

Oakley is aware that pursuant to Evers v. Sullivan, 2000 WI App. 144, No. 00-0127, the Court of Appeals has subsequently reversed the Circuit Court decision issued by Dane County. Oakley would contend however, that this decision was not rendered at the time of his Post-conviction Motion in the instant case.

Oakley therefore contends that the Court of Appeals erred in affirming the Trial Court's decision to deny his request to be re-sentenced.

III. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DECISION TO GRANT THE STATE'S MOTION TO WITHDRAW THE PRIOR PLEA AGREEMENT WITH THE DEFENDANT.

Whether the State violated the spirit of the plea agreement was a question of law which a reviewing Court decides De Novo. State v. Ferguson, 166 Wis. 2d 317, 320-21, 479 N.W. 2d 241, 243 (Ct. App. 1991).

The law setting forth when a Prosecutor may withdraw a plea agreement made with a Defendant was clearly set forth in the case of State v. Beckes, 100 Wis. 2d 1, 300 N.W. 2d 871 (Ct. App. 1980). There the Court held that a Prosecutor may withdraw from a plea bargain anytime prior to the entry of a guilty plea by the Defendant or other action by him constituting detrimental alliance on the agreement. Id at 8. The Trial Court when assessing the Beckes case in it's memorandum decision, clearly misunderstood the Beckes holding (11:1-2). Trial counsel for Oakley attempted to point out the error of the Court's ways by way of a Motion for Reconsideration (14: 1-4), but for whatever reason there was no record made regarding the Motion for Reconsideration and it is safe to assume that it was denied.

The State will argue that Oakley has waived the right to raise this issue on appeal due to Oakley's entry of the no contest plea. As pointed out by State v. Riekkoff, 112 Wis. 2d 119, 332 N.W. 2d 744 (1983), (citing Hawkins v. State, 26 Wis. 2d 443, 132 N.W. 2d 545, (1965), the general rule is that a plea of guilty, voluntarily and understandably made, constitutes a waiver of non-jurisdictional defects and defenses, including claims of violations of Constitutional rights prior to the plea. Riekkoff at 123. Oakley would contend in this case that the due process violation took place after the entry of the first no contest plea. As trial counsel for Oakley properly preserved the issue for appeal (9:1-3,

14:1-4) this issue should be able to be raised.

The State may also argue that Oakley has waived the right to proceed with this issue by agreeing to waive it at the time of sentencing on the subsequent entry of plea on January 13, 1999 (23, pp. 2-3). Oakley would contend however that the subsequent plea entered in this matter was in violation of his due process rights and is therefore void as a matter of right.

In State v. Dugan, 193 Wis. 2d 610, 534 N.W. 2d 897 (Ct. App. 1995), the Court stated:

> "At it's most fundamental level, due process concerns the right to be treated fairly. The law is clear that when an individual has given up the right to a jury trial by pleading guilty, fundamental fairness requires that the individuals expectations be fulfilled." State v. Castillo, 205 Wis. 2d 599, 556 N.W. 2d 425 (Ct. App. 1996).

The State may argue that State v. Peske, 121Wis.2d 471, 360 N.W.2d 695 (Ct. App. 1984) would stand for the proposition that Oakley has waived his right to appeal the issue of his prior plea agreement. Oakley would disagree. In Peske, trial counsel did not move to have the plea agreement specifically enforced before the entry of sentence. While Oakley concedes that a plea can waive defects relating to the plea that occurred prior to it's entry, State v. Kazee, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995) the specific error in this case took place after the plea was entered.

The State may also contend that Oakley did not raise the issue of the enforcement of the first plea agreement before he entered his plea on the second plea and therefore the issue cannot be raised for the first time on appeal. County of Racine v. Smith, 122 Wis. 2d 431, 438, 362 N.W.2d 439 (Ct. App. 1984). Oakley would contend however that there was nothing more he could do to

preserve his right to appeal the issue relating to the first plea agreement. The Trial Court had already decided on his Motion and had denied it. The action taken by Oakley in the instant case, as relating to the second plea makes perfect sense. Oakley's only option would have been not to enter a plea, taken the matter to trial and risk receiving a harsher sentence and run the risk that an appellate court would conclude that the State was allowed to withdraw it's prior plea agreement. Rather than get hit over the head with a large hammer, Oakley opted to receive a blow from a smaller hammer.

Because the claimed violation of Oakley's due process rights after the first plea was already entered in this matter and was entered in violation of his due process rights, he should be entitled to withdraw his plea and have the terms of the original plea agreement complied with or in the alternative have his plea withdrawn.

CONCLUSION

The Court of Appeals committed error when it affirmed the Trial Court's conclusion that a condition of probation that Oakley cannot father any additional children unless it could be shown that he could support them was reasonable. The Court of Appeals committed further error in affirming the Trial Court's decision denying his Motion for Re-sentencing in light of new factors. Lastly, the Court of Appeals erred in denying Oakley the right to withdraw his plea or to be re-sentenced in accordance with the first plea agreement.

Respectfully submitted:

Dated this 12 day of January, 2001.

ATTORNEY FOR APPELLANT

Timothy T. Kay
State Bar No. 1019396

PREPARED BY:
KAY & KAY LAW FIRM
675 North Brookfield Rd.
Brookfield, WI 53045
(262) 784-7110

INDEX TO APPENDIX

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 5,970 words.

Dated this 12 day of January, 2001.

Timothy T. Kay
State Bar No. 1019396

W.C.

COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3328-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID W. OAKLEY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. David W. Oakley appeals from judgments convicting him of three counts of failing to support his children, *see* WIS. STAT.

§ 948.22(2) (1997-98),[1] as a repeat offender, and from a postconviction order denying his challenge to his sentence and a probation condition. On appeal, Oakley challenges proceedings relating to the withdrawal of a previous plea agreement and a condition of probation. He also alleges that a new factor warrants resentencing. We reject these claims and affirm.

¶2 Oakley was originally charged with nine counts of failing to support his nine children, who have four different mothers. The information charged seven counts of failing to support seven of these children. Although Oakley entered into a plea agreement relating to these charges, the State moved at sentencing to withdraw the plea agreement. The court granted the motion to withdraw.[2] Thereafter, Oakley entered into a subsequent plea agreement under which he entered no contest pleas to three counts of failing to support his children. The other counts were dismissed but read-in for sentencing. The State agreed to cap its sentence recommendation to a total of six years on all counts; Oakley was free to argue for a different sentence.

¶3 The court accepted the plea agreement and sentenced Oakley to three years in prison on the first count, imposed and stayed an eight-year term on the two other counts, and imposed a five-year term of probation consecutive to the prison sentence. As a condition of probation, the court barred Oakley from having any additional children until he could show the court that he had the means to support them and had been consistently supporting the children he already had.

---

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

[2] The reasons for this turn of events are not relevant to our disposition on appeal.

¶4 Postconviction, Oakley challenged this condition of probation and alleged a new factor warranting resentencing: a Dane county circuit court judge had held that it was unlawful to transfer inmates to out-of-state prisons, as had happened to Oakley. The court rejected these arguments. Oakley appeals.

¶5 Oakley argues that the circuit court erroneously granted the State's plea withdrawal motion and that he did not waive this claim of error when he entered no contest pleas as part of a subsequent plea agreement. We disagree. Oakley's decision to enter into a subsequent plea agreement, which reduced the counts against him from seven to three, waived his right to challenge matters relating to the first plea agreement. A valid no contest plea waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights. *See* ***State v. Lechner***, 217 Wis. 2d 392, 404 n.8, 576 N.W.2d 912 (1998).[3]

¶6 Furthermore, as part of the proceedings relating to the subsequent plea agreement, Oakley acknowledged that he was waiving the right to appeal the demise of the first plea agreement. In light of the foregoing, we do not address Oakley's claims relating to the demise of the first plea agreement.

¶7 We turn to Oakley's claim that a new factor required resentencing. Oakley moved the circuit court to modify his sentence because his transfer to an out-of-state facility was contrary to a decision of a Dane county circuit court which held that such transfers were unlawful. Oakley also contended that his

[3] Oakley does not contend that the colloquy relating to the subsequent plea agreement was deficient.

transfer defeated the court's intention of having him support his children while he was incarcerated through a work-release privilege. . .

¶8 Oakley's arguments fail for several reasons. First, the decision of the Dane county circuit court was reversed by the Wisconsin Court of Appeals. *See Evers v. Sullivan*, 2000 WI App 144, No. 00-0127. In denying Oakley's sentence modification motion, the circuit court correctly recognized that a decision of one circuit court does not have precedential value for other circuit courts of this state.

¶9 The circuit court also stated that it was aware at sentencing of the possibility that Oakley would be transferred out of state. The transfer is not a factor of which the circuit court was unaware at the time of sentencing and therefore is not a new factor. *See State v. Kaster*, 148 Wis. 2d 789, 803, 436 N.W.2d 891 (Ct. App. 1989).

¶10 The circuit court did not contemplate that Oakley would support his children while he was incarcerated. In its sentencing remarks, the court perceived incarceration as serving other goals, such as deterring other parents from failing to support their children and to punish Oakley for failing to support his children. The court noted that while incarcerated, Oakley would not "be in a position to pay any meaningful support for these children." Oakley did not show a new factor warranting sentence modification.

¶11 We turn to Oakley's challenge to the condition of probation that bars him from having additional children until he shows the court that he has the means to support them and has been consistently supporting the children he already had. Oakley argues that this condition of probation is not reasonable or appropriate and

violates his state and federal constitutional rights relating to privacy and procreation.

¶12 The circuit court rejected Oakley's postconviction challenge to this condition. The court reiterated that Oakley was unable to support his current children and unlikely to be able to fully support them in the future. The court reasoned that barring Oakley from procreating was rationally linked to the crimes he committed, failure to support his children, and that this served the public's interest in avoiding additional Oakley offspring whom Oakley would not support. As the court succinctly noted, "[Oakley's] crime is entirely related to his fathering of children he is not inclined to support." The court observed that Oakley's rehabilitation would not "be eased by additional family obligations."

¶13 A condition of probation may impinge upon a constitutional right as long as the condition is not overly broad and is reasonably related to the defendant's rehabilitation. *See* ***Krebs v. Schwarz***, 212 Wis. 2d 127, 131, 568 N.W.2d 26 (Ct. App. 1997). Probation conditions are within the sentencing court's discretion. *See* ***State v. Nienhardt***, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995).

¶14 In ***Krebs***, the defendant, who was convicted of sexually assaulting his daughter, was prohibited from entering into a sexual relationship with another adult unless his probation agent approved. *See* ***Krebs***, 212 Wis. 2d at 130-31. The court held that this provision was rationally related to Krebs's rehabilitation, was not overly broad and merely restricted, rather than eliminated, a constitutional right of privacy. *See* ***id.*** at 131-32.

¶15 Similarly, Oakley's condition of probation does not prohibit him from engaging in sexual activity. It merely prohibits Oakley from having

additional children whom he cannot support, a task at which Oakley has wholly failed and for which he has been held criminally liable. The condition is narrowly drawn and is reasonably related to Oakley's rehabilitation and protection of the public.

¶16 The condition placed on Oakley falls between those approved in ***Krebs*** and ***State v. Garner***, 54 Wis. 2d 100, 105-06, 194 N.W.2d 649 (1972), where the court upheld as reasonable a condition of probation requiring payment of child support where the defendant had been convicted of failing to pay child support. These cases support our conclusion that Oakley's condition of probation is reasonable and not overly broad.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUN

STATE OF WISCONSIN,

Plaintiff,

vs.

DAVID W. OAKLEY,

Defendant.

NOTICE OF MOTION AND MOTION TO STRIKE CONDITION OF PROBATION AND TO MODIFY SENTENCE

Case No. 98-CF-206

PLEASE TAKE NOTICE, that the above named Defendant, David Oakley, by his attorney Timothy T. Kay, of Kay & Kay Law Firm, will move the court, the Honorable Fred H. Hazlewood, Circuit Court Judge, presiding at the Manitowoc County Courthouse, 1010 South 8th St. Manitowoc, WI 54221-2000, on January 4, 2000, at 11:30 a.m., for approximately fifteen (15) minutes for the following relief:

1. That the Defendant moves the court, pursuant to sec. 809.30(2)(h) Wis.Stats. and sec. 974.02(1) Wis. Stats., for an Order striking that condition of Defendant's probation which wa imposed, on January 13, 1999, in error. This Motion is brought in order to request that the court strike that condition of probation that orders the Defendant not to have any further children while on probation unless Defendant can demonstrate he has the ability to support the children and has been consistent in his support of the children that he already has.

2. That the Defendant also moves the court, pursuant to sec. 809.30(2)(h) Wis. Stats. and sec. 974.02(1) Wis. Stats., t modify the sentence previously imposed based on the presentatio

of a new factor not known to the court at the time of sentencir

AS GROUNDS, the Defendant asserts:

1. During Defendant's Plea and Sentencing Hearing on January 13, 1999, Defendant was placed on probation for a perio of 5 years. A copy of the Judgment of Conviction is attached hereto and incorporated herein by reference as Exhibit A.

2. As a condition of probation, Defendant was ordered n to have any further children unless it could be demonstrated t Defendant could support the children and had been consistent w supporting the children he already has.

3. Such a condition of probation is neither reasonable appropriate. Section 973.09(1) Wis. Stats.

4. Although the court has broad discretion to impose reasonable and appropriate conditions upon a probationer, such conditions must serve two objectives: rehabilitation and protection of State and community interests. State v. Carrizales, 191 Wis.2d 85, 93, 528 N.W.2d 29 (Ct. App. 1995); State v. Miller, 175 Wis.2d 204, 208, 499 N.W.2d 215 (Ct. App. 1993).

5. The condition of probation in question does not serv to rehabilitate Defendant by removing the temptation to commit further crimes. State v. Nienhardt, 196 Wis.2d 161, 537 N.W.2 123 (Ct. App. 1995). Further, this condition is not intended separate Defendant from others that could have a detrimental influence upon him. Edwards v. State, 74 Wis.2d 79, 246 N.W.2

109 (1976).

6. The probation condition prohibiting Defendant from having further children does not serve to protect the interests of the State and community. See Carrizales, 191 Wis.2d at 95 (Defendant's refusal to admit guilt, the admission being the condition of probation needed to be satisfied, made it difficu for his probation officer to ensure the safety of the communit If a woman is not smart enough to avoid having children by Defendant, so be it. That is her right.

7. That the probation condition imposed is in violation the Fourteenth Amendment, Section One, of the United States Constitution and Article One, Section One, of the State of Wisconsin Constitution. See Skinner v. Oklahoma, 316 U.S. 535 (1942); Weber v. City of Cedarsburg, 125 Wis.2d 22, 370 N.W.2d 791 (Ct. App. 1985); and Termination of Parental Rights to A.M.K., 105 Wis.2d 91, 312 N.W.2d 840 (Ct. App. 1981).

8. That exposing the Defendant to an additional prison t should he exercise a basic and fundamental right is both harsh and unconscionable.

9. That subsequent to the enter of the present Judgment Conviction on January 13, 1999, a Dane County Circuit Court Ju issued a ruling that inmates cannot be forced to accept transf to prison facilities outside of Wisconsin. See attached Exhib B.

10. That if Defendant is forced to remain in an Oklahoma facility, his ability to be placed on parole is hindered and

ability to obtain employment to begin satisfying his obligation to his children is frustrated.

11. That Defendant contends that the decision of the Dane County Circuit Court is a new factor entitling Defendant to be resentenced in light of this Court's desire to eventually have Defendant begin accepting responsibility for his children. See State v Franklin, 148 Wis.2d 1, 434 N.W.2d 609 (1989); State v. Ralph, 156 Wis.2d 422, 456 N.W.2d 657 (Ct. App. 1990).

12. This Motion is further based upon the pleadings filed and served, and the Judgment of Conviction entered in this action.

WHEREFORE, Defendant respectfully requests the following:

1. That this Court strike the unlawful condition of probation relating to having other children;

2. That this Court resentence Defendant in light of the Decision of the Dane County Circuit Court.

3. That this Court grant such other relief as deemed equitable and just.

Dated this 12 day of November, 1999.

Timothy T. Kay
Attorney for the Defendant
State Bar No. 1019396

Assisted by:
Ronald J. Sonderhouse
State Bar No. 1034264

WISCONSIN | CIRCUIT BRANCH # 3 | MANITOWOC

State of Wisconsin, Pl ff
-vs-
DAVID W. OAKLEY, Defendant

09-29-66
Defendant's Date of Birth

TYP F CONVICTION (Select On
X Sentence to Wisconsin State Prisons
___ Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation

COURT CASE NUMBER 98 CF 206

The [X] Court [ ] Jury found the defendant guilty of the following crime(s):

CT.	CRIME(S)	WIS STATUTE(S) VIOLATED	PLEA	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DA C CO
	NON-SUPPORT AS REPEATER	948.22(2) & 939.62(1)(b)	NO CONTEST	F	E	01- 04-

IT IS ADJUDGED that the defendant is convicted on 01-13-99 as found guilty and:

[X] on 01-13-99 is sentenced to prison for three (3) years consecutive to the sen
defendant is presently serving out of Sheboygan County.

[ ] on _____ is sentenced to intensive sanctions for _____

[ ] on _____ is sentenced to county jail/HOC for _____

[ ] on _____ is placed on probation for _____

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (includes jail assessments; drug assessments; penalty assessments) $ _____

Court costs (includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ _____

Attorney fees $ _____

Restitution $ _____

DNA Anal. Surcharge $ _____

Other $ _____

Mandatory victim/witness surcharge(s)
felony _____ counts $ _____
misdemeanor _____ counts $ _____

Jail: To be incarcerated in the county jail/HOC fo

Confinement Order For Intensive Sanctions se only - length of term: _____

Miscellaneous

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
JAN 18 1999
CLERK OF CIRCUIT COURT

IT IS ADJUDGED that 118 days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shal if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the C Waupun

BY THE COURT:

Circuit Court Judge/Cl

01-13-99

NAME OF JUDGE	DISTRICT ATTORNEY	DEFENSE ATTORNEY
Fred H. Hazlewood	Michael C. Griesbach, Ass't.	Hans Ribbens

DEPARTMENT OF CORRECTIONS
DOC-20 (Rev. 06/96)

Wisconsin Statutes, Sections 939.50, 939.51, 972
JUDGM

WISCONSIN | CIRCUIT BRANCH # 3 | MANITOWOC

State of Wisconsin, Plaintiff
-vs-
DAVID W. OAKLEY, Defendant
09-29-66
Defendant's Date of Birth

TYPE OF CONVICTION (Select On
___ Sentence to Wisconsin State Prisons
___ Sentence Withheld, Probation Ordered
X Sentence Imposed & Stayed, Probation

COURT CASE NUMBER 98 CF 206

The [X] Court [ ] Jury found the defendant guilty of the following crime(s):

CT.	CRIME(S)	WIS STATUTE(S) VIOLATED	PLEA	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DA C CO
2 CTS.	NON-SUPPORT AS REPEATER	948.22(2) & 939.62(1)(b)	NO CONTEST	F	E	01- & 04-

IT IS ADJUDGED that the defendant is convicted on 01-13-99 as found guilty and:

[X] on 01-13-99 is sentenced to prison for eight (8) years on each count, concurr

[ ] on _____ is sentenced to intensive sanctions for _____

[ ] on _____ is sentenced to county jail/HOC for _____

[X] on 01-13-99 is placed on probation for five (5) years, consecutive to the sen defendant is presently serving, to commence on defendant's discharge date after par

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (includes jail assessments; drug assessments; penalty assessments) $ _____

Court costs (includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ _____

Attorney fees $ _____

Restitution $ _____

DNA Anal. Surcharge $ _____

Other $ _____

Mandatory victim/witness surcharge(s)
felony _____ counts $ _____
misdemeanor _____ counts $ _____

Jail: To be incarcerated in the county jail/HOC for ninety (90) days, between hours of em to commence upon defendant's release

Confinement Order For Intensive Sanctions sen only - length of term: _____

Miscellaneous
Additional ninety (90) days jail, bet of employment, stayed; to be imposed discretion.
Comply with support orders consistent ability to pay.
Maintain fulltime employment.
Defendant is ordered not to have any children while on probation unless i shown to the Court that he is meetin his other children and can meet the one.

IT IS ADJUDGED that no days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall l if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City Manitowoc

NAME OF JUDGE
Fred H. Hazlewood

DISTRICT ATTORNEY
Michael C. Griesbach, Ass't.

DEFENSE ATTORNEY
Hans Ribbens

STATE OF WISCONSIN FILED
CLERK OF CIRCUIT COURT

BY THE COURT:
Circuit Court Judge/Clerk
01-13-99

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Case File No. 98 CF 206

Plaintiff,

CRIMINAL COMPLAINT

-vs-

MANITOWOC COUN
STATE OF WISCON
FILED

DAVID W OAKLEY, d.o.b. 9/29/66
1134 N 21ST ST
MANITOWOC WI 54220
Defendant.

MAY 18 1993

CLERK OF CIRCUIT

COUNT #1 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998, at the City of Manitowoc in said County and State, DAVID W OAKLEY did, as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more consecutive days, to-wit: Intentionally failed to provide child support for Sarah Oakley, d.o.b. 4/20/85, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony).

COUNT #2 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more consecutive days, to-wit: Intentionally failed to provide child support for Stephanie Oakley, d.o.b. 8/2/87, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony)

COUNT #3 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more consecutive days, to-wit: Intentionally failed to provide child support for Ashley Oakley, d.o.b. 10/7/88, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony)

COUNT #4 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more

6-1

consecutive days, to-wit: Intentionally failed to provide child support for Jonathan Oakley, d.o.b. 5/1/90, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony)

COUNT #5 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more consecutive days, to-wit: Intentionally failed to provide child support for Kourtney Thompson, d.o.b. 6/23/87, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony)

COUNT #6 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more consecutive days, to-wit: Intentionally failed to provide child support for Nicholas Havel, d.o.b. 7/25/88, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony)

COUNT #7 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more consecutive days, to-wit: Intentionally failed to provide child support for Devin Ward, d.o.b. 12/12/95, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony)

COUNT #8 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of January, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for one hundred twenty or more consecutive days, to-wit: Intentionally failed to provide child support for Darek Ward, d.o.b. 3/20/97, contrary to Wisconsin Statute Section 948.22(2). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(b) by a fine not to exceed $10,000 or imprisonment not to exceed eight years, or both. (Class E felony)

COUNT #9 JILL A MERTENS, Manitowoc Co. Child Support Enforcement Agency, being duly sworn on oath says on information and belief that between the 1st day of February, 1998 and the 30th day of April, 1998 at the City of Manitowoc in said County and State, DAVID W OAKLEY did as a repeater, unlawfully and intentionally fail to provide child support for less than one hundred twenty

consecutive days, to-wit: Intentionally failed to provide child support for Darla Ward, d.o.b. 1/29/98, contrary to Wisconsin Statute Section 948.22(3). This offense is punishable upon conviction pursuant to Wisconsin Statute Section 939.62(1)(a) by a fine not to exceed $10,000 or imprisonment not to exceed three years, or both. (Class A misdemeanor)

The complainant further alleges that she is informed by the records of the Manitowoc County Child Support Enforcement Agency and the Manitowoc County Clerk of Court office that on June 13, 1989, a Divorce Judgment was enter in re the marriage of Jill M Oakley and David W Oakley, Case Number 88FA307 by the Hon. Fred H. Hazlewood in Circuit Court Branch III for Manitowoc County, Wisconsin. Custody of the minor children of the parties , Sarah, d.o.b. 4/20/85; Stephanie, d.o.b. 8/2/87 and Ashley, d.o.b. 10/7/88 was awarded to Jill M Oakley n/k/a Jill M Cochrane. The Court ordered David W Oakley to pay child support in the amount of $25.00 per week commencing June 16, 1989. Child support payments were ordered to be made payable to the Manitowoc County Clerk of Court office. The Divorce Judgment was amended pursuant to an Order entered on February 25, 1998 and required David W. Oakley to pay child support at the rate of $32.55 per week commencing February 6, 1998 The last child support payment was received from David W Oakley on December 29, 1997 in the amount of $43.42. An arrearage is owing to Jill M Cochrane in the amount of $4,241.96 plus interest in the amount of $939.96 and assigned arrears to the State of Wisconsin in the amount of $6,311.00 plus interest in the amount of $1,798.73 as of April 30, 1998.

The complainant further alleges that she is informed by the records of the Manitowoc County Child Support Enforcement Agency and the Manitowoc County Clerk of Court office that on March 13, 1991 a Paternity Judgment was entered in re the Paternity of Jonathan Oakley, State of Wisconsin and Jill M. Oakley v. David W Oakley, Case No. B90PA106 by the Hon. Lisa Grens, former Family Court Commissioner for Manitowoc County, Wisconsin. Custody of the minor child of the parties, Jonathan, d.o.b. 5/1/90 was awarded to Jill M Oakley n/k/a Jill M Cochrane. The Court ordered David W Oakley to pay child support in the amount of 10% of his gross income commencing March 22, 1991. Child support payments were ordered to be made payable to the Manitowoc County Clerk of Court office. The Paternity Judgment was amended pursuant to an Order entered on February 24, 1998 and required David W Oakley to pay child support at the rate of $9.75 per week commencing February 6, 1998. The last child support payment was received from David W Oakley on December 29, 1997 in the amount of $60.24. An arrearage is owing to Jill M Cochrane in the amount of $78.00 as of April 30, 1998.

The complainant further alleges that she is informed by the records of the Manitowoc County Child Support Enforcement Agency and the Manitowoc County Clerk of Court office that on September 4, 1991 a Divorce Judgment was entered in re the marriage of Lucretia Oakley and David W Oakley, Case No. 91FA073 by the Hon. Fred H. Hazlewood in Circuit Court Branch III for Manitowoc County, Wisconsin. Custody of the minor child of the parties, Kourtney Thompson, d.o.b. 6/23/87, was awarded to Lucretia Oakley n/k/a Lucretia Thompson. The Court ordered David W Oakley to pay child support at the rate of 17% of his gross income to commence upon David W Oakley becoming employed. Child support payments were ordered to be made payable to the Manitowoc County Clerk of Court office. The last child support payment was received from David W Oakley on December 29, 1997 in the amount of $87.66.

The complainant further alleges that she is informed by the records of the Manitowoc County Child Support Enforcement Agency and the Manitowoc County Clerk of Court office that on November 1, 1988 a Paternity Judgment was entered in re the paternity of Nicholas Lee Havel, State of Wisconsin and Cheri A. Havel v. David W Oakley, Case No. B88PA084 by the Hon. Fred H. Hazlewood, Circuit Court Branch III. Manitowoc County, Wisconsin. Custody of the minor child. Nicholas, d.o.b. 7/25/88 was awarded to Cheri A Havel n/k/a Cheri A Pasdo. Pursuant to a Stipulation and Order Amending Paternity Judgment entered on November 21, 1989, David W Oakley was ordered to pay child support at the rate of $5.00 per week commencing December 22, 1989. The Judgment was again amended pursuant to a Stipulation and Order entered on March 2, 1998 in which David W Oakley was ordered to pay child support at the rate of $11.12 per week commencing February 6, 1998. Child support payments were ordered to be made payable to the Manitowoc County Clerk of Court. The last child support payment was received from David W Oakley on December 29, 1997 in the amount of $17.36. An arrearage is owing to Cheri Pasdo in the amount of $313.96 plus interest in the amount of $55.18 and assigned arrears to the State of Wisconsin in the amount of $1,271.00 plus interest in the amount of $362.33 as of April 30, 1998.

The complainant further alleges that she is informed by the records of the Manitowoc County Child Support Enforcement Agency and the Manitowoc County Clerk of Court office that on March 11, 1996 a Paternity Judgment was entered in re the Paternity of Devin Ward, State of Wisconsin and Rachel Ward v. David W Oakley, Case No. B96PA000002 by the Hon. Lisa Grens, former Family Court Commissioner for Manitowoc County, Wisconsin. Custody of the minor child, Devin, d.o.b. 12/12/95 was awarded to Rachel Ward. Pursuant to an Order Amending Judgment entered on August 28, 1996, David W Oakley was ordered to pay child support at the rate of $15.00 per week commencing August 30, 1996. Child support payments were ordered to be made payable to the Manitowoc County Clerk of Court office. The last child support payment was received from David W Oakley on December 29, 1997 in the amount of $26.05. An arrearage is owing to Rachel Ward in the amount of $889.75 plus interest in the amount of $120.60 and assigned arrears to the State of Wisconsin in the amount of $450.00 plus interest in the amount of $66.84 as of April 30, 1998.

The complainant further alleges that she is informed by the records of the Manitowoc County Child Support Enforcement Agency and the Manitowoc County Clerk of Court office that June 9, 1997 a Paternity Judgment was entered in re the Paternity of Darek D Ward, State of Wisconsin and Rachel Ward vs David W Oakley, Case No. B97PA042 by the Hon. Lisa Grens, former Family Court Commissioner for Manitowoc County, Wisconsin. The Court found that David W Oakley was the father of Darek D Ward, d.o.b. 3/20/97 and the matter of payment of child support was held open pending further order of the Court.

The complainant further alleges that she is informed by the records of the Manitowoc County Child Support Enforcement Agency and the Manitowoc County Clerk of Court office that on February 12, 1998, a Paternity Summons and Petition was filed in re paternity of Darla D Ward, State of Wisconsin and Rachel Ward vs David W Oakley, Case No. B98PA030. On March 4, 1998, David W Oakley filed a Waiver of First Appearance with the Court agreeing that he was the father of Darla D Ward born to Rachel Ward on January 29, 1998.

David W Oakley has failed to provide support for Sarah Oakley, d.o.b. 4/20/85; Stephanie Oakley,

d.o.b. 8/2/87; Ashley Oakley, d.o.b. 10/7/88; Jonathan Oakley, d.o.b. 5/1/90; Kourtney Thompson. d.o.b. 6/23/87; Nicholas Havel, d.o.b. 7/25/88; Devin Ward, d.o.b. 12/12/95 and Darek Ward, d.o.b. 3/20/97 in excess of one hundred twenty consecutive days as outlined in paragraphs 1-8 above and less than one hundred twenty consecutive days for Darla Ward, d.o.b. 1/29/98 as outlined in paragraph 9 above. Pursuant to Section 948.22(4) of the Wisconsin Statutes, the defendant's failure to provide support in violation of a court order is prima facie evidence of intentional failure to provide support pursuant to Section 948.22(2) and (3).

The complainant further alleges that she is informed by the records of the Clerk of Court for Sheboygan County that David W Oakley was convicted of one felony count of intimidation of a witness, contrary to Wisconsin Statute Section 940.43(3) in Circuit Court for Sheboygan County on October 20, 1997.

The information contained in the records of the Manitowoc County Child Support Enforcement Agency , Manitowoc County Clerk of Circuit Court office and Sheboygan County Clerk of Court office is to be believed because it is collected and recorded in the regular course of official business.

Complainant

Subscribed and sworn to before me this 18 day of May .1998

(Asst.) District Attorney

Approved for filing

~~(Asst.)~~ District Attorney

LAW OFFICES
OLSON, WINTER AND FOX

1607 WASHINGTON STREET - P.O. BOX 156 - TWO RIVERS, WI 54241-0156
Telephone: (920) 793-1364
FAX (920) 793-5379
E-mail: olwif@dataplusnet.com

Don A. Olson (1918
J. Steve Winter
Jerome L. Fox
Court Commission
Mark R. Rohrer

September 24, 1998

Honorable Fred H. Hazlewood
Manitowoc County Courthouse
Post Office Box 2000
Manitowoc, WI 54221-2000

LETTER MEMORANDUM

Dear Judge Hazlewood:

Pursuant to our discussions in court last Thursday, I am providing you this letter memorandum of law as to whether or not the State can withdraw the plea agreement entered in this matter.

FACTS

On August 25, 1998 the defendant, David Oakley, pled no contest to one count of failur pay child support contrary to § 948.22(2). Upon his plea to the charge as part of the plea agree entered into between the defendant and the State of Wisconsin the remaining charges in 98 CF 1 were dismissed and read in for sentencing purposes. The plea agreement entered into between t defendant and the State further contemplated the following recommendation from the State:

A. That the defendant be placed on probation for period of five years;

B. The defendant have a sentence of 8 years to Wisconsin State Prison imposed but sta

C. That the defendant keep current on his child support and pay $50 per week on arrea unless his take home pay was less then $150 per week;

D. That the defendant work at least 50 hours per week;

E. That any changes in the defendant's employment must be reported to the Child Sup Agency within 48 hours of such change;

F. That the State would be asking for 8 months jail time.

As to conditions A through E listed above the defendant agreed to these conditions as a j recommendation to the court. As to condition F stated above, the defendant was permitted "free argue" for a shorter period of time less then 8 months jail. On September 17, 1998, this court w sentence the defendant on the charge he pled to in this matter. The State made a request of this to vacate the plea agreement and restore the defendant his prior status quo as of the plea date tak August of this year. That status quo for the defendant would be a jury trial. The court, upon the State's request, vacated the plea agreement and the defendant's plea in this matter. The defenda objected to the court's order vacating the plea agreement in this matter and requested the opport to be heard through a letter memorandum.

DISCUSSION

In State v. Rivest, 106 Wis. 2d 406, 316 N.W. 2d 406, 316 N.W. 2d 395 (1982) the cour forth the procedures that had to be taken before a plea agreement could be vacated by a court w defendant had entered a plea to a criminal charge. The Supreme Court held-

> "By analogy to contract law, we concluded that a plea agreement may be vacated where a material and substantial breach of the plea agreement has been proved . . .
>
> We further hold that the constitutional due process requirements of 'decency and fairness' are satisfied where the burden is placed upon the parties seeking to vacate the agreement to establish both the breach, and that the breach is sufficiently material to warrant releasing the parties from its promises (prosecution or defense) before the same judge who accepted the plea, whenever possible
>
> Our holding that a prosecutor is relieved from the terms of a plea agreement where it is judicially determined that the defendant has materially breached the conditions of the agreement is consistent with numerous decisions in other jurisdictions holding that a party is not bound to a plea agreement where the other party is in substantial default of a material issue." Rivest @ page 414

The Court of Appeals in State v. Lukensmeyer, 140 Wis. 2d 92, 409 N.W. 2d 395 (1987) further established the burden of proof upon the State in vacating a plea agreement under the standard set forth by the court in Rivest. The court held "this burden must be established by clear and convincing evidence. Lukensmeyer @ page 103

Therefore, under Rivest and Lukensmeyer, before the court can vacate the plea agreement in this matter, the State, by motion and proof must establish by clear and convincing evidence that Mr. Oakley both violated the terms of the plea agreement and that such a violation of the plea agreement by Mr. Oakley was both a material and substantial breach of the plea agreement in this matter. Therefore, since the State has failed to bring a

motion to this affect and failed to establish the required proofs established by Rivest and Lukensmeyer. The plea to the charge in this matter as well as the dismissal of the charges as part of the plea agreement remain in affect.

Sincerely,

OLSON, WINTER and FOX

Mark R. Rohrer

MRR:fab

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC C

STATE OF WISCONSIN, Plaintiff

-vs-

DAVID W. OAKLEY, Defendant

MEMORANDUM DECISION

Case No. 98 CF 206

The defendant was bound over for trial follow preliminary hearing on seven counts of felony nonsupport. plea hearing on August 25, 1998, the defendant entered contest plea, was convicted on one count, and the remaining c were dismissed and read in. Sentencing on the conviction wa for September 17, 1998. On that date the State informed the that it did not wish to proceed with the plea agreement. district attorney stated that since entering into the agre their office became aware of new information to the effect revocation proceedings had been commenced on the defen existing probation.

Defense counsel agreed that the defendant cou restored to the status quo by simply vacating the judgme conviction and setting the matters for trial. However, c asked for some time to brief the question on whether the should be compelled to go through with the plea agreement defendant has filed a brief and the State has belatedly res to that brief. Both arguments cite two cases that quite f are not in point. These cases, State v. Rivest, 106 Wis. 2

and State v. Lukensmeyer, 140 Wis. 2d 92 deal with whether defendant is entitled to be placed in the position every agrees the defendant, in this case, should be in.

This case raises the question of whether the agree should be specifically enforced.

Without question the State has breached the agree Plea agreements are often analogized to contracts. A contrac be breached without there being any specific wrongdoing attri to the party in breach. Indeed, it's often argued that a has a legal right to breach a contract if they're willing t damages. In this instance the State has decided to withdraw the agreement based on facts it asserts were discovered aft entered into the agreement. Regardless of when the State acq the information it uses to justify withdrawing from the agre or even if the information is a good reason for withdrawing the agreement, there are certainly no facts in the pr circumstances that would justify compelling the State to f through with that agreement.

This very issue was addressed in State v. Becker Wis. 2d 1. In that case the State withdrew from the agr before a plea of either guilty or no contest by the defenda entered. The stated reason for the State's withdrawal wa defendant's request for substitution of judge filed afte parties had announced their plea agreement. The Court no connection with that case,

> "In this case, defendant took no action in reliance on the plea bargain. If a contract analogy were applied, we would say that the State breached the contract, but the defendant has not proven that he was damaged as a result of the breach." **Beckes**, page 4.

The Court, however, did not limit its inquiry t contract analogy. It also addressed the defendant's argument his expectations were entitled to protection under the due pr clauses of State and Federal Constitutions. With respect to claim the Court noted:

> "We hold that, in this context, the due process clauses of state and federal constitutions do not protect a defendant against shattered expectations. Those expectations can be as easily shattered by a judge who declines to accept the plea bargain, yet judges are not required to accept plea bargains."

The Court noted that the situation might be differ there was detrimental reliance on the plea bargain. Ho there was no showing in that case nor has there been any i case.

The Court accordingly orders that the judgme conviction be vacated and that the matter be set for trial charges in the Information.

Dated this 4th day of November, 1998.

BY THE COURT,

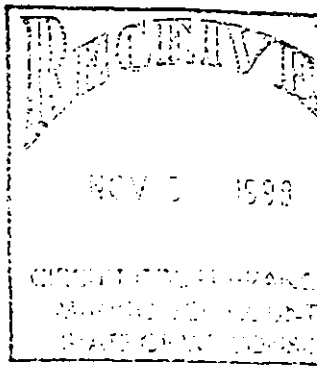
FRED H. HAZLEWOOD
Circuit Judge

LAW OFFICES
OLSON WINTER AND FOX

1607 WASHINGTON STREET - P.O. BOX 156 - TWO RIVERS, WI 54241-0156
Telephone: (920) 793-1364
FAX (920) 793-5379
E-mail olwifi@dataplusnet.com

Don A. Olson (1918-
J. Steve Winter
Jerome L. Fox
Court Commissione
Mark R. Rohrer

November 5, 1998



Honorable Fred H. Hazlewood
Manitowoc County Courthouse
Post Office Box 2000
Manitowoc, WI 54221-2000

LETTER MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION

RE: State of Wisconsin vs. David Oakley
Case No. 98 CF 206

Dear Judge Hazlewood:

I am filing this letter memorandum in support of our motion for reconsideration in this m

FACTS

On August 25, 1998 the defendant, David Oakley, pled no contest to one count of failur pay child support contrary to § 948.22(2). Upon his plea to the charge as part of the plea agree entered into between the defendant and the State of Wisconsin the remaining charges in 98 CF 2 were dismissed and read in for sentencing purposes. The plea agreement entered into between t defendant and the State further contemplated the following recommendation from the State.

A. That the defendant be placed on probation for a period of five years.

B. The defendant have a sentence of 8 years to Wisconsin State Prison imposed but stayed

C. That the defendant keep current on his child support and pay $50 per week on arrears unless his take home pay was less then $150 per week;

D. That the defendant work at least 50 hours per week;

E. That any changes in the defendant's employment must be reported to the Child Suppor Agency within 48 hours of such change;

F. That the State would be asking for 8 months jail time.

As to conditions A through E listed above the defendant agreed to these conditions as a jc recommendation to the court. As to condition F stated above, the defendant was permitted "free argue" for a shorter period of time less then 8 months jail. On September 17, 1998, this court wa sentence the defendant on the charge he pled to in this matter. The State made a request of this c to vacate the plea agreement and restore the defendant his prior status quo as of the plea date tak August of this year. That status quo for the defendant would be a jury trial. The court, upon the State's request, vacated the plea agreement and defendant's plea in this matter. The defendant objected to the court's order vacating the plea agreement in this matter and requested the opport to be heard through a letter memorandum.

The defendant filed a letter memorandum in support of its position that the district attorne request and the court's decision to vacate the judgment of conviction in this matter was improper The district attorney, on October 17, 1998, filed a letter memorandum supporting the court's dec in this matter. Subsequent to the filing of the letter memorandums, the court issued a decision da November 4, 1998 in which the court ordered "that the judgment of conviction be vacated and th the matter be set for trial on the charges in the information." (See attached memorandum decisio Judge Hazlewood dated November 4, 1998, page 3) The court relied on the case of *State v. Beec 100 WI 2nd 1, 300 NW 2nd 871 (1980)* as the basis of the decision in vacating the judgment of conviction and setting all charges in the information for trial. It is from this order that the defenc has filed a motion for the court to reconsider it's decision of November 4, 1998.

DISCUSSION

The court, in this case, relied on *Beces* as a basis to vacate the judgment of conviction an setting the charges in the information for trial. In that case the defendant, prior to entering a ple entered into a plea agreement with the district attorney's office. Furthermore, the court conside the following in deciding this case "the issue is whether the defendant is entitled to specific performance of a plea bargain which was withdrawn by the prosecution after the defendant's acceptance but before a plea of guilty was entered." (see *Beces* @ page 2.)

The court held that a prosecutor may be relieved from the terms of a plea bargain in a situation where a defendant has not entered a guilty plea provided that the defendant has not rel on the plea bargain to his detriment. (see *Beces* @ page 7)

The court, however, went on to state that "our holding is a narrow one. so long as the prosecutor does not abuse his discretion in doing so, he may withdraw from a plea bargain at any prior to the entry of the guilty plea by the defendant or other action by him constituting detriment reliance on the agreement." (emphasis added *Beces* @ page 8)

It is the defendant's position that because he had entered a no contest plea prior to the sta request to not be held by the plea bargain in this matter that the analysis of *State v. Beces* is not applicable to the facts in this situation.

The defendant asserts that the appropriate case for analysis is *State v. Rivest*, 106 Wis. 2c 406, 316 N.W. 2d 395 (1982) In that case, the defendant *Rivest* was charged with murder and ar robbery. He was then subsequently waived into adult court. *Rivest* entered into an agreement in of being charged with 1st degree murder which include the following:

1. He pled guilty to the charge of armed robbery;

2. That he testify against a co-defendant.

3. That he pass a polygraph examination *Rivest* at page 406

The defendant failed to testify truthfully during the trial The district attorney, subsequer *Rivest's* testimony during the trial involving the co-defendant filed a motion to set aside the plea agreement and guilty plea. The court, after a hearing, granted the district attorney's request and vacated the judgment of conviction and plea agreement. A judgment of conviction could be vac by a court after a defendant had entered a plea to a criminal charge The Supreme Court set for procedures as to when it is proper to vacate a plea agreement and judgment of conviction is a cr case The Court held

> "By analogy to contract law, we concluded that a plea agreement may be vacated where a material and substantial breach of the plea agreement has been proved .
>
> We further hold that the constitutional due process requirements of 'decency and fairness' are satisfied where the burden is placed upon the parties seeking to vacate the agreement to establish both the breach, and that the breach is sufficiently material to warrant releasing the parties from its promises (prosecution or defense) before the same judge who accepted the plea, whenever possible.
>
> Our holding that a prosecutor is relieved from the terms of a plea agreement where it is judicially determined that the defendant has materially breached the conditions of the agreement is consistent with numerous decisions in other jurisdictions holding that a party is not bound to a plea agreement where the other party is in substantial default of a material issue " *Rivest* @ page 414

The Court of Appeals in *State v. Lukensmeyer*, 140 Wis. 2d 92, 409 N.W. 2d 395 (198 further established the burden of proof upon the State in vacating a plea agreement under the standard set forth by the court in *Rivest*. The court held "this burden must be established by cle

and convincing evidence. *Lukensmeyer a page 103*

Therefore, under *Rivest* and *Lukensmeyer*, before the court can vacate the judgment of conviction and plea agreement, the State, by motion and proof must estabish by clear and convincing evidence that Mr. Oakley violated the terms of the plea agreement and that such a violation of the plea agreement by Mr. Oakley was both a material and substantial breach of the plea agreement in this matter. Because the State has failed to bring a motion to this affect and failed to establish the required proofs established by *Rivest* and *Lukensmeyer*, the judgment of conviction as well as the dismissal of the charges in the criminal complaint remain in affect.

Sincerely,

OLSON, WINTER and FOX

Mark R. Rohrer

MRR fab

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC C

STATE OF WISCONSIN, Plaintiff

-vs-

DAVID OAKLEY, Defendant

MEMORANDUM DECISION

Case No. 98 CF 206

Defendant through his attorney, Timothy Kay, has a motion seeking post-conviction relief. Specifically, he that this court modify his sentence and strike a condition probation. The court concludes that argument would not be helpful in deciding the issues. Both requests are denied.

THE MOTION TO MODIFY SENTENCE

The offender asks that his sentence be modified b on a new factor. The new factor is Dane County Circuit Jud Moira Krueger's decision that the Department of Corrections lacks authority under state law to place prisoner's outside boundaries of the state.

Frankly, this court is stunned by the naivete demonstrated by this motion. I know Judge Krueger and ser a committee with her. Consequently, I have a high regard f her legal ability. However, the decision of one circuit ju is not precedent for another. The reasoning of one judge m helpful to another and might have an impact on that judge's decision. But to suggest that it constitutes a "new factor justifying a modification of a sentence is incredible. Eve

more disturbing is the fact that the movant didn't include copy of the decision but rather a report of the decision in Milwaukee Journal of October 20, 1999. I have a high regar that newspaper too. But, a newspaper report of a judge's decision should not be cited as an authoritative source in court proceeding.

The practice of sending some prisoners out of sta might, in an appropriate case, have constituted a new facto sentencing decisions reached before the transfers were star At the time of Mr. Oakley's sentencing that possibility was known to this court as well as all judges in the state. Th possibility that a prisoner might be transferred out of sta could not be a new factor. Returning a prisoner to the sta Judge Krueger's decision is affirmed by an appellate court doesn't seem to me to be something that would have an effec sentencing either. If the department acted illegally, the solution would be to return Mr. Oakley along with the other this state--not to modify a sentence.

Finally, this court concluded in an unrelated cas that where and in what institution a prisoner serves his or sentence is not subject to the court's control. See attach Exhibits A, B, C.

MOTION TO STRIKE A CONDITION OF PROBATION

At the time of sentencing, a consecutive five-ye period of probation was ordered with imposed and stayed

sentences of eight years. The offender seeks to have a condition on that probation term that he not procreate unles can demonstrate an ability to support his children stricken Frankly, I would agree with much of counsel's argument were not for the fact that Mr. Oakley was sentenced and placed o probation for felony nonsupport. Interestingly that fact s to be missing in the arguments expressed to the court in th motion papers.

At the time of sentencing Mr. Oakley was the fath by a number of women, of at least seven children. He had n physical or mental disability that would prevent him from gainful employment. Given his background the court noted t it would always be a struggle to support these children and truth he could not reasonably be expected to fully support The court noted at the time of sentencing that given his in and the fact that he not made any effort to have his child support adjusted in light of his serial responsibilities, h couldn't pay what had been ordered. But, at least the publ has a right to expect an effort. Instead, he paid no suppo even when he was employed.

Counsel suggests at paragraph six of the motion t "...prohibiting Defendant from having further children does serve to protect the interests of the State and community." cannot be seriously argued that a condition limiting Mr. Oakley's right to procreate to his ability to support is n

the interest of the state or community. The legal responsibility to support a child and willful avoidance of responsibility is the reason he's been convicted and senten His crime is entirely related to his fathering of children not inclined to support.

Seen in this light the court's condition that he father any additional children until he can demonstrate an ability to meet his support obligations makes sense. In addition, his rehabilitation is not going to be eased by additional family responsibilities.

In the same paragraph counsel takes the position it is the woman's responsibility to avoid having a child th offender will not support. "If a woman is not smart enough avoid having children by Defendant, so be it. That is her right."

The idea that the onus should rest on the shoulde the mother in addition to being an incredibly sexist positi finds no support in the law. It's in the interests of the community that parents, male and female, support their chil If it wasn't, I suspect the legislature would not have made crime to willfully fail to support a child. Parents, regar of their sex, are obliged by law to support their children. When their good faith efforts fall short society should pic the slack. When a parent willfully avoids this obligation, society or the other parent must pick up the slack and the

provides for the criminal prosecution of the derelict parent

Of course, an individual has a right to enjoy and participate in parenthood. That this right is of constitut dimensions is obvious. But, so is the right to walk the st as a free person. Mr. Oakley is not a free man because he h been sentenced to prison for willfully failing to support a child. This court can think of no more reasonable restrict on his behavior while on probation that he not father child he cannot support.

Dated this 2nd day of December, 1999.

BY THE COURT:

FRED H. HAZLEWOOD
Circuit Judge

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC C

STATE OF WISCONSIN, Plaintiff

ORDER

-vs-

Case No. 98 C

DAVID OAKLEY, Defendant

For the reasons stated in the accompa memorandum decision of even date, the motions are denied.

Dated this 2nd day of December, 1999.

BY THE COURT:

FRED H. HAZLEWOOD
Circuit Judge

STATE OF WISCONSIN

S U P R E M E C O U R T

No. 99-3328-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID W. OAKLEY,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT II,
AFFIRMING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR MANITOWOC COUNTY,
FRED H. HAZLEWOOD, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

JAMES E. DOYLE
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-
Respondent
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523

TABLE OF CONTENTS

Page

CASES CITED

Page

Page

Page

Page

Page

Page

STATUTES CITED

OTHER AUTHORITIES

STATE OF WISCONSIN

S U P R E M E C O U R T

No. 99-3328-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID W. OAKLEY,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT II,
AFFIRMING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR MANITOWOC COUNTY,
FRED H. HAZLEWOOD, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

ORAL ARGUMENT AND PUBLICATION

The supreme court routinely entertains oral argument and publishes its opinion.

SUMMARY OF ARGUMENT

I.

As a condition of probation following his convictions of intentionally failing to support his children, the defendant, David W. Oakley ("Oakley") was prohibited from having any additional children unless he could show that he would support them along with his other offspring. This condition does not violate Oakley's constitutional right to procreate.

The right to procreation is not absolute. The state may impose on the exercise of this right reasonable restrictions which are narrowly drawn to serve a compelling state interest.

Two such interests come together in this case. First, the state has a substantial interest in insuring that children have adequate financial support. In addition, the state has an overriding interest in rehabilitating those who have been convicted of violating the criminal law. Thus, the state has an especially potent interest in rehabilitating those who have been convicted of violating the law which requires parents to support their children.

Conversely, a convicted probationer retains only limited constitutional rights on the theory that he may be rehabilitated without the need to incarcerate him.

So a circuit court, which has broad discretion to select conditions of probation, may impose conditions which impinge on the limited rights of a probationer as long as they appear to be reasonably calculated to accomplish his rehabilitation and are not overly broad.

Although courts in other jurisdictions have not been quick to endorse restrictions on the right to procreation as a condition of probation, they have not flatly prohibited the practice, but have disapproved the condition under the

circumstances of particular cases. However, none of those circumstances exist in this case.

Conditioning Oakley's probation on a prohibition against having additional children he would not support is reasonably related to his rehabilitation because it directly addresses the criminal conduct he was convicted of committing. Prohibiting him from adding more victims to the list of children he would not support essentially forbids him to commit additional crimes like the kind of which he was convicted.

Moreover, this condition serves to insulate Oakley from situations likely to result in recidivism since expanding the number of children he was required to support would make it more difficult to, hence less likely that he would, support any of them, while having new children could enlarge the distance between Oakley and his older children, thereby shrinking his already-questionable resolve to support them. Obversely, refraining from fathering more progeny would help Oakley's rehabilitation since it would be easier to resume supporting his children if he did not keep multiplying the number of children he was required to support.

The condition of probation which prohibits Oakley from having additional children he would not support is not only a reasonable means of achieving his rehabilitation, but is narrowly drawn to focus on that goal.

This condition does not prevent Oakley from exercising his rights to marry or to have consensual sexual relations. He can even have more children as long as he is willing to accept his concomitant responsibility to support any additional children his exercise of these rights might bring into the world.

Less intrusive means of insuring that Oakley complies with his support obligations will not work. Court orders to support his children have already been tried and failed. It can reasonably be inferred that means of collection such

as garnishment of wages, liens on property or civil contempt have either been tried and failed, or have been rejected because it was determined that there was little chance they would succeed.

Oakley is not likely to be rehabilitated by continuing to treat the symptoms of his problem. His treatment needs to be prophylactic. The problem must be kept from becoming worse if there is to be any hope for a cure.

Since it is permissible to condition probation on a prohibition against any sexual activity, which necessarily includes a prohibition against procreation, and if it is permissible to condition the probation of a defendant who has been convicted of nonsupport on a requirement that he provide support, it follows that it is permissible to condition the probation of a defendant who has been convicted of nonsupport on a prohibition against procreation to the limited extent that further reproduction would exacerbate the problem of the defendant's refusal to comply with his legal obligation to support his children.

The circuit court properly ordered a defendant convicted of intentionally failing to support his children not to have additional children he would not support as a condition of probation.

II.

Oakley is not entitled to modification of his prison sentence because of a new factor.

There is no evidence whatever in the record to support his assertions that he is incarcerated in a facility outside the state where he is not eligible for work release, while he would be able to obtain work release privileges if he were in a Wisconsin institution.

But even if there were such evidence, it would still not establish the existence of a new factor because the

sentencing court was aware that Oakley could be transferred to a prison out of the state, and assumed that he would serve his sentence in prison without work release. So even if Oakley was being denied work release privileges because he was incarcerated outside Wisconsin, that would not frustrate the intent of his sentence.

In any event, modifying Oakley's sentence would not change the place of his incarceration. If Oakley wants to change the conditions of his confinement he must bring an appropriate writ rather than seeking a reduction of the length of the sentence itself.

III.

Oakley waived any right to complain about a breach of the initial plea agreement.

After the prosecutor breached the initial plea agreement by declining to recommend probation as he had promised, the parties negotiated a second agreement, and Oakley entered new pleas of no contest.

A plea of no contest waives all non-jurisdictional defects and defenses occurring before it is entered, including defects directly related to the plea, defenses based on a denial of due process and defenses based on a breach of a previous plea agreement. Controlling precedent is directly on point. By entering a second plea, Oakley waived any right to complain about the breach of the initial plea agreement as a matter of law.

Moreover, as part of the second plea agreement, Oakley expressly waived any right to complain about the breach of the first agreement on appeal.

After his conviction, a defendant can choose to waive his right to an appeal. The vast majority of courts which have considered the question have ruled that a defendant can also agree to relinquish his right to appeal prior to his

conviction as part of a valid plea agreement. The Wisconsin Court of Appeals has suggested as much.

If a defendant can waive his right to a trial and agree to be convicted pursuant to a plea agreement, he can waive the same way his right to attack on appeal the conviction to which he has just agreed. If a defendant can automatically waive any right to raise issues on appeal simply be entering a plea, he can expressly waive this right by addressing the waiver in the plea agreement.

There is no sound reason to prohibit the parties from reaching an agreement which precludes the defendant from appealing since it may be in the best interest of both the defendant and the state to do so. Public policy also favors the final settlement of criminal litigation to reduce the proliferation of appeals. A defendant who does not waive his right to appeal knowingly, voluntarily and intelligently has a remedy by withdrawing his plea.

Oakley has never claimed that his second pleas were involuntary or unintelligent. Neither were these pleas void because Oakley's expectations were not fulfilled. At the plea colloquy Oakley expressly acknowledged that he was giving up his right to appeal the denial of his motion for specific performance of the first plea agreement, so he had no expectation that he would be able to appeal after his pleas were accepted.

A litigant may not attempt to manipulate the legal process by consciously asserting inconsistent positions. Since Oakley deliberately elected to waive his right to appeal the breach of the initial plea agreement to obtain what he perceived as a benefit at the time, he is precluded from changing his strategy and attempting to appeal anyway.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY ORDERED A DEFENDANT CONVICTED OF INTENTIONALLY FAILING TO SUPPORT HIS CHILDREN NOT TO HAVE ADDITIONAL CHILDREN HE WOULD NOT SUPPORT AS A CONDITION OF PROBATION.

Pursuant to a plea agreement, the defendant, David W. Oakley, pleaded no-contest to three counts of intentionally failing to support his children (R. 20; 21 and 23 at 10). The evidence presented at the preliminary hearing showed that Oakley, who had nine children by four different women, had not provided any support for any of them for over six months (R. 39 at 3-7 and 13-15).

Oakley was sentenced to three years in prison on the first count (R. 21). On the other two counts, sentence was imposed but stayed, and Oakley was placed on probation for five years to commence at the end of his incarceration (R. 20).

As conditions of probation, the circuit court ordered Oakley to support the children he already has, and prohibited him from having any additional children during the period of probation unless he could show that he would support them along with his other offspring (R. 20 and 23 at 29-30).

It is generally agreed that a court may require a defendant convicted of nonsupport to support his family as a valid condition of probation. *State v. Garner*, 54 Wis. 2d 100, 104-05, 194 N.W.2d 649 (1972). *Accord, e.g., Brown v. U.S.*, 579 A.2d 1158, 1160-61 (D.C. App. 1990) (and cases collected). Oakley asserts, though, that the condition prohibiting him from having additional children he would not support is unreasonable, and violates his constitutional right to procreate.

Although the penumbral right to personal privacy, which incorporates a derivative right to procreation, is undeniably fundamental, it is not absolute. *Carey v. Population Services Intern.*, 431 U.S. 678, 685-86 (1977); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *State v. Fisher,* 211 Wis. 2d 665, 672, 565 N.W.2d 565 (Ct. App. 1997). Thus, the state may impose on the exercise of this right reasonable restrictions which are narrowly drawn to serve a compelling state interest. *Id.*

Two such interests come together in this case. First, the state has a substantial interest in insuring that children have adequate financial support. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). In addition, the state has an overriding interest in rehabilitating those who have been convicted of violating the criminal law. *O'Doherty v. Seniuk*, 390 F. Supp. 456, 460 (E.D. N.Y. 1975); *Hillery v. Procunier*, 364 F. Supp. 196, 202 (N.D. Cal. 1973), *vacated on other grounds sub nom., Pell v. Procunier*, 417 U.S. 817 (1974); *People v. Zaring*, 10 Cal. Rptr. 2d 263, 268 (Cal. Ct. App. 1992); *State v. J.K.*, 383 A.2d 283, 289 (Del. 1977), *cert. denied sub nom., Thornton v. Delaware*, 435 U.S. 1009 (1978); *State v. Rice*, 655 P.2d 1145, 1154 (Wash. 1982) (*en banc*). Thus, the state has an especially potent interest in rehabilitating those who have been convicted of violating the law which requires parents to support their children.

Conversely, a probationer who has been convicted of committing a crime forfeits the interest of a law-abiding citizen in a full assortment of undiluted constitutional rights. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 658, 517 N.W.2d 540 (Ct. App. 1994); *State v. Evans,* 77 Wis. 2d 225, 230, 252 N.W.2d 664 (1977). He retains only a conditional liberty as a matter of grace on the theory that he may be rehabilitated without the need to incarcerate him. *State v. Griffin,* 131 Wis. 2d 41, 54-55, 388 N.W.2d 535 (1986), *aff'd,* 438 U.S. 868 (1987); *Evans*, 77 Wis. 2d at 230-31.

So a circuit court, which has broad discretion to select appropriate conditions of probation, may impose conditions which impinge on the limited constitutional rights of the probationer as long as they appear to be reasonably calculated to accomplish his rehabilitation and are not overly broad. *Krebs v. Schwarz*, 212 Wis. 2d 127, 131, 568 N.W.2d 26 (Ct. App. 1997); *State v. Carrizales*, 191 Wis. 2d 85, 93, 528 N.W.2d 29 (Ct. App. 1995); *Von Arx*, 185 Wis. 2d at 658; *Griffin,* 131 Wis. 2d at 55.

Whether a condition of probation is a reasonable means to achieve rehabilitation is reviewed for erroneous exercise of discretion. *State v. Nienhardt,* 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995). Whether the condition restricts rights more broadly than necessary to achieve its rehabilitative purpose is considered *de novo*. *Carrizales*, 191 Wis. 2d at 92.

Admittedly, courts in other jurisdictions have not been quick to endorse restrictions on procreation as conditions of probation. But with one possible exception, the state has not found any opinion which flatly prohibits the practice. Rather, the decisions have usually disapproved this kind of condition under the particular circumstances involved in the individual case.[1]

In some cases, courts have found that prohibiting the probationers from having children was an inappropriate condition of probation because it had no relation to the crimes of which they were convicted, and thus was not reasonably related to their rehabilitation. *See, e.g., U.S. v. Smith*, 972 F.2d 960 (8th Cir. 1992) (possession of heroin); *People v. Dominguez*, 64 Cal. Rptr. 290 (Cal. Ct.

[1]The rationale of *State v. Mosburg*, 768 P.2d 313 (Kan. App. 1989), is not entirely clear. The Kansas court discussed several of the cases which have found a no-procreation condition invalid under the circumstances of that case, then simply asserted that the state should not have the power to unduly intrude on a woman's right to privacy by penalizing her for getting pregnant. *See id.*, 768 P.2d at 315.

App. 1967) (robbery); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979) (child abuse).

By contrast, conditioning Oakley's probation on a prohibition against having additional children he would not support is reasonably related to his rehabilitation because it directly addresses the criminal conduct he was convicted of committing.

Oakley was convicted of refusing to support the children he already has.[2] So prohibiting him from adding more victims to the list of children he would not support essentially forbids him to commit additional crimes like the kind of which he was convicted.

A condition prohibiting a probationer from continuing to violate the law is directed to the essence of rehabilitation. *Wagner v. State,* 89 Wis. 2d 70, 77, 277 N.W.2d 849 (1979).

Indeed, merely increasing the number of children could conceivably decrease the prospects for Oakley's rehabilitation. Expanding the financial obligations with which Oakley was required to comply would make it more difficult to, and therefore less likely that he would, fully meet either his existing or his added responsibilities. And having new children could enlarge the chronological and emotional distance between Oakley and his older children,

---

[2]This was not Oakley's only problem. As the court of appeals noted in *State v. Oakley,* 226 Wis. 2d 437, 594 N.W.2d 827 (Ct. App. 1999), *rev'd on other grounds,* 2000 WI 37, 234 Wis. 2d 528, 609 N.W.2d 786, Oakley also refused to pay his fines, letting them remain outstanding for years. *See id.*, 226 Wis. 2d at 439 and 441. He also intimidated one of his children and another witness when he was charged with abusing the child. *See id.* As the court stated: "The refusal to pay the fines and the victim intimidation both show Oakley's cavalier attitude toward the justice system. . . . Oakley needs to be rehabilitated from his perception that one may flout valid court orders and the judicial process with impunity and suffer no real consequence." *Id.* at 441.

thereby shrinking his already-questionable resolve to support them.

Conditions of probation are reasonably related to rehabilitation when they serve to insulate the defendant from situations likely to result in recidivism. *Cf. State v. Lo,* 228 Wis. 2d 531, 538-39, 599 N.W.2d 659 (Ct. App. 1999) (probationer prohibited from having contact with other members of gang); *Nienhardt,* 196 Wis. 2d at 167-70 (probationer required to stay out of community where victim lived); *State v. Miller,* 175 Wis. 2d 204, 208-12, 499 N.W.2d 215 (Ct. App. 1993) (probationer convicted of making obscene telephone calls forbidden to make calls to females outside family); *State ex rel. Mulligan v. DH&SS,* 86 Wis. 2d 517, 273 N.W.2d 290 (1979) (probationer convicted of alcohol-related crimes forbidden to consume alcohol); *Edwards v. State,* 74 Wis. 2d 79, 84-85, 246 N.W.2d 109 (1976) (probationer prohibited from having contact with codefendants which might lead to future crime).

Obversely, refraining from fathering more progeny he would not support would affirmatively help Oakley comply in the future with the law he has violated in the past. It would be easier for Oakley to resume supporting his children if he did not keep on multiplying the number of children he was required to support. *Cf. Garner,* 54 Wis. 2d at 104-06 (defendant convicted of failure to support properly required to pay support as condition of probation).

The condition of probation which prohibits Oakley from having additional children he would not support is not only a reasonable means of achieving his rehabilitation, but is narrowly drawn to focus on that goal.

The disputed condition does not prevent Oakley from exercising his fundamental right to marry. *See generally Zablocki,* 434 U.S. at 384-85. To the contrary, Oakley would take a significant step toward rehabilitation if he married one of the mothers of his living children and

established a household where he would support that family.

The condition does not prevent Oakley from exercising his right to have private, consensual, non-commercial sexual relations, *see generally Krebs*, 212 Wis. 2d at 131, if he takes the usual precautions to avoid pregnancy.

The condition does not even prevent Oakley from exercising his right to have sexual relations which result in pregnancy, *i.e.*, exercising his right to reproduce, as long as he is willing to accept his concomitant responsibility to support any additional children he might bring into the world. Oakley is prohibited only from having more children he would not support, a condition carefully tailored to the crime of which he was convicted as well as to his independent legal and moral obligations. *Cf. Krebs*, 212 Wis. 2d at 130-32 (condition requiring probationer convicted of sexual assault to obtain agent's approval to engage in any sexual relationship reasonable and not overly broad).

This customization of the condition of Oakley's probation importantly distinguishes this case from almost every other case the state has found, which typically prohibit the probationers from having any children under any circumstances. *See, e.g., Zaring*, 10 Cal. Rptr. 2d at 266; *People v. Pointer*, 199 Cal. Rptr. 357, 362 (Cal. Ct. App. 1984); *Rodriguez*, 378 So. 2d at 8; *Mosburg*, 768 P.2d at 314. The single exception is *U.S. v. Smith,* where the defendant was prohibited from having another child unless he could demonstrate that he was supporting his five existing or imminently expected children by different mothers. *See id.*, 972 F.2d at 961.

But *Smith* is also distinguishable from the present case for a different reason. Smith was convicted of possessing heroin, not failing to support his children, so the court concluded that his rehabilitation could be accomplished by the less intrusive means of ordering him to support his

dependents and meet other family responsibilities. *See id.* at 961-62. *See generally Pointer*, 199 Cal. Rptr. at 364-65 (overbreadth question is whether there are available alternative means of achieving same result without infringing as much on probationer's rights).[3]

Oakley's rehabilitation cannot be achieved, however, merely by ordering him to support any additional children he might produce. Although ordering support might work in other cases, it is not a reasonably feasible means of achieving rehabilitation in this case because it has already been tried and it has not worked. Oakley has previously been ordered by the courts to support seven of his children (R. 39 at 2-11), but he has ignored these orders and refused to provide any support for any of his children (R. 39 at 12-14).

Oakley suggests that there are other less intrusive means of insuring support such as garnishment of wages, a lien on property or civil contempt. *See* Wis. Stat. § 767.30(3)(b), (d) and (e). Because there was no trial in this case, it is not clear what methods were employed to get Oakley to support his children, but since he was charged with multiple counts of nonsupport after refusing to pay any support for over six months, it may reasonably be inferred that either these less drastic methods were tried and failed, or that it was determined not to try them because there was little chance that they would succeed. Indeed, Oakley seems to concede that there is little likelihood any methods short of coercion will get him to provide proper support. *See* Brief for Defendant-Appellant-Petitioner at 11.

Under these circumstances, Oakley is not likely to be rehabilitated merely by continuing attempts to treat the symptoms of his problem. As his convictions demonstrate, he does not respond well to that kind of

[3]This case is also significantly different from *Zablocki*, which involved a statute prohibiting all persons with support obligations to marry unless they could demonstrate that they would continue to support their existing children. *See id.*, 434 U.S. at 375.

treatment. Instead, the treatment needs to be prophylactic. The problem must be kept from becoming worse if there is to be any hope for a cure.

Thus, prohibiting Oakley from having additional children he would not support is not an overly broad infringement on his right to procreation, but is a reasonably narrow means of achieving the rehabilitation of a defendant convicted of refusing to obey court orders to support the children he already has.

This case is positioned at the confluence of *Garner* and *Krebs*. If it is permissible to condition probation on a prohibition against any sexual activity, which necessarily includes a prohibition against procreation, and if it is permissible to condition the probation of a defendant who has been convicted of nonsupport on a requirement that he provide support, it follows that it is permissible to condition the probation of a defendant who has been convicted of nonsupport on a prohibition against procreation to the limited extent that further reproduction would exacerbate the problem of the defendant's refusal to comply with his legal obligation to support his children.

II. THE DEFENDANT IS NOT ENTITLED TO MODIFICATION OF HIS PRISON SENTENCE BECAUSE OF AN ALLEGED NEW FACTOR.

Oakley contends that his prison sentence should be modified because of a new factor. He asserts that he has been incarcerated in a facility outside the state where he is not eligible for work release, while he would be able to obtain work release privileges if he were in a Wisconsin institution.

But a defendant must do more than merely assert that there is a new factor. A defendant must prove the existence of a new factor by clear and convincing evidence. *State v. Michels,* 150 Wis. 2d 94, 96-97, 441 N.W.2d 278 (Ct. App. 1989); *State v. Franklin,*

148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). And there is no evidence whatever in the record to prove any of Oakley's factual assertions.

There is no evidence that Oakley is currently incarcerated outside the State of Wisconsin. There is no evidence that Wisconsin prisoners incarcerated outside the state are ineligible for work release. And there is no evidence that Oakley would be eligible for work release regardless of where he was incarcerated.

To be eligible for work release, an inmate must reside in a minimum security facility and have a community custody classification. Wis. Admin. Code § DOC 324.04(1) (Sept. 1997). There is no evidence that Oakley meets the criteria for placement in a minimum security facility. Nor is there any evidence that he has or should have a community custody classification.

Furthermore, an inmate cannot be placed on work release unless he has a confirmed job offer. Wis. Admin. Code § DOC 324.07(1) (Sept. 1997). And there is no evidence that anyone has offered Oakley a job.

This chasmal lack of proof cannot be filled simply by making unsupported assertions in an appellate brief. Appellate review is limited to the record. *Duhame v. Duhame,* 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989); *Austin v. Ford Motor Co.,* 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). So factual assertions not supported by evidence in the record must be disregarded. *State v. Boshcka,* 178 Wis. 2d 628, 637, 496 N.W.2d 627 (Ct. App. 1992); *State v. Edwardsen,* 146 Wis. 2d 198, 211-12, 430 N.W.2d 604 (Ct. App. 1988).

Absent any evidence, much less clear and convincing evidence, to support Oakley's claim that there is a new factor which warrants modification of his sentence, his contention must be rejected for that reason alone.

But even if Oakley had proved that he was being denied work release privileges because he was incarcerated in another state, he still would not have established a new factor.

To qualify as a new factor, the matter which the defendant posits as a justification for reduction of his sentence must be new. The matter must have been unknown at the time the sentence was imposed either because it did not exist or because it was unknowingly overlooked. *State v. Johnson,* 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997); *State v. Harris,* 174 Wis. 2d 367, 379, 497 N.W.2d 742 (Ct. App. 1993).

Here, however, the circuit court was well aware when Oakley's sentence was imposed that he could be sent to a prison outside the state to serve it (R. 43 at 2).

Finally, while a new factor must be new, it cannot be novel. There must be a nexus, rather, between the new factor and the factors relied on in selecting the old sentence which frustrates the intent of the court in imposing it. *Johnson*, 210 Wis. 2d at 203; *Harris*, 174 Wis. 2d at 379; *Michels*, 150 Wis. 2d at 99.

There is nothing in the circuit court's sentencing rationale which suggests any intent to have Oakley furloughed from prison so he could earn money to pay support. To the contrary, the court

> recognize[d that] if Mr. Oakley goes to prison, he's not going to be in a position to pay any meaningful support for these children. So . . . if Mr. Oakley goes to prison . . . his support obligation may rest on the shoulders of the burdened taxpayer . . . .

> But . . . we have to make hard decisions and we can't compromise all of these competing goals that we have here.

(R. 23 at 25).

If anything, therefore, it seems the court assumed that Oakley would serve his prison sentence in prison without the possibility of work release. The court appears to have contemplated that Oakley would become employed and resume paying support only after he was released from prison and started serving his consecutive term of probation (R. 23 at 29-30).

Even if Oakley was denied work release privileges because of incarceration outside the state, then, that would not frustrate the intent of his sentence. So the lack of work release privileges would fail to qualify as a new factor for that additional reason.

In any event, the solution to Oakley's problem, if there was proof of any problem, would not be modification of his sentence since any change in the length of the sentence would not necessarily change the place where he was serving it. If Oakley wants to change the conditions of his confinement, including the place of incarceration, he must bring an appropriate writ instead of seeking sentence modification, *State v. Krieger,* 163 Wis. 2d 241, 259-60, 471 N.W.2d 599 (Ct. App. 1991), although the chances of success would be distant since Wisconsin inmates have no legitimate expectation that they will not be transferred to a prison outside the state. *See Evers v. Sullivan*, 2000 WI App 144, 237 Wis. 2d 759, ¶ 17-18, 615 N.W.2d 680.

III. THE DEFENDANT WAIVED ANY RIGHT TO COMPLAIN ABOUT A BREACH OF THE INITIAL PLEA AGREEMENT.

A. Any Right To Complain Was Waived As A Matter Of Law By The Entry Of A Second Plea After The Breach.

The parties reached an initial plea agreement which provided that Oakley would plead no contest to one count of the information, and that the parties would jointly recommend a sentence of eight years to be imposed but stayed with Oakley placed on probation for five years (R. 37 at 1). Oakley entered a plea pursuant to the agreement, and was found guilty by the court (R. 37 at 7-8).

At the sentencing, however, the prosecutor declined to make the recommendation to which he had agreed (R. 33 at 2). Since the probation Oakley was already serving on an unrelated charge was about to be revoked, the prosecutor did not believe it would be in the interest of justice to put Oakley on probation again (R. 33 at 3).

The prosecutor's refusal to comply with the plea agreement for reasons unrelated to its terms constituted a breach, *see State v. Smith,* 207 Wis. 2d 258, 271-72, 558 N.W.2d 379 (1997), giving Oakley the right to seek specific performance. *State v. Scott,* 230 Wis. 2d 643, 656, 602 N.W.2d 296 (Ct. App. 1999). He tried (R. 9), but his motion was denied (R. 11).

Oakley requested reconsideration (R. 12 and 14). While that motion was pending, though, Oakley's probation on the unrelated charge was revoked, and he was sentenced to three years in prison for that offense (R. 23 at 2 and 11). So rather than pursuing available means of enforcing the initial plea agreement in the present case, Oakley abandoned that effort and negotiated

instead a second agreement in which he consented to enter new pleas of no contest (R. 23 at 2-3, 10 and 20).

A plea of no contest waives all non-jurisdictional defects and defenses occurring before it is entered. *State v. Lechner,* 217 Wis. 2d 392, 404 n.8, 576 N.W.2d 912 (1998); *State v. Kazee,* 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995). It can waive defects relating directly to the plea. *Kazee,* 192 Wis. 2d at 218-20. It can waive defenses based on a denial of due process. *Lechner,* 217 Wis. 2d at 404 n.8. And more specifically, it can waive defenses based on a denial of due process because the prosecutor breached an earlier plea agreement. *State v. Paske,* 121 Wis. 2d 471, 472-74, 360 N.W.2d 695 (Ct. App. 1984). *Cf. State v. Smith,* 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989) (defendant waives right to complain about breach of the plea agreement by failing to object when breach occurs).

In *Paske,* the defendant entered pleas pursuant to a plea agreement. *Id.*, 121 Wis. 2d at 472. At the sentencing, the prosecutor refused to stand by his original recommendation because the defendant had been convicted of another offense in the meantime. *Id.* at 472-73. Instead of pursuing available remedies for the breach, the defendant reentered his pleas under a renegotiated agreement. *Id.* at 473-74. The court held that the defendant's second pleas waived his right to complain about the preceding breach of the initial plea agreement. *Id.* at 472.

This case is legally indistinguishable from *Paske*. The prosecutor's breach of the initial plea agreement and the circuit court's refusal to afford a remedy all occurred before Oakley entered his second pleas. By knowingly, voluntarily and intelligently pleading no contest a second time, Oakley waived those defects and any defenses based on them as a matter of law.

B. The Defendant Expressly Waived Any Right To Complain On Appeal About the Breach Of The Initial Plea Agreement.

Not only did Oakley automatically waive any right to complain about the breach of the initial plea agreement by entering new pleas, but as part of his second plea agreement, Oakley expressly waived any right to complain about this breach on appeal (R. 23 at 3 and 7-9).

There is no question that after his conviction, a defendant can choose to waive his right to an appeal. *State ex rel. Flores v. State,* 183 Wis. 2d 587, 616, 516 N.W.2d 362 (1994).

The vast majority of courts which have considered the issue have ruled that a defendant can also agree to relinquish his right to appeal prior to his conviction as part of a valid plea agreement. *E.g., U.S. v. Robinson,* 187 F.3d 516, 517 (5th Cir. 1999); *U.S. v. Williams,* 184 F.3d 666, 668 (7th Cir. 1999); *U.S. v. Michelsen,* 141 F.3d 867, 874 (8th Cir.), *cert. denied,* 525 U.S. 942 (1998); *U.S. v. Ready,* 82 F.3d 551, 555 (2d Cir. 1996); *People v. Nichols,* 493 N.E.2d 677, 680 (Ill. App. Ct. 1986); *People v. Rodriguez,* 480 N.W.2d 287, 290-91 (Mich. Ct. App. 1991); *People v. Callahan,* 604 N.E.2d 108, 110 (N.Y. 1992); *State v. Perkins,* 737 P.2d 250, 251-52 (Wash. 1987) (and additional authorities collected in these cases). *See also ABA Standards Relating to Criminal Appeals* § 21-2.2, cmt. at 21-24 (1980).

The Wisconsin Court of Appeals has similarly suggested as much. In *State v. Hubbard,* 206 Wis. 2d 651, 558 N.W.2d 126 (Ct. App. 1996), it said,

> If a waiver of the right to appeal the trial court's denial of Hubbard's double jeopardy claim was an important consideration for the State, it could have been expressly addressed in the plea agreement. Absent an express waiver, we conclude Hubbard is

> entitled to have the merits of his double jeopardy claim reviewed on this appeal.

Id., 206 Wis. 2d at 657.

There is nothing about a conviction which should make that event a barrier between the time a defendant can elect to forego an appeal and a time he would be foreclosed from making this decision, especially in the case of a plea agreement where the judgment of conviction is only the court's imprimatur on the defendant's consent to be convicted.

If a defendant can waive by means of a plea agreement his fundamental right to a trial, the "main event" in the process of criminal justice, and agree to be convicted without invoking the procedures which shield a defendant from oppression and unjust or erroneous judgments, *compare State v. Wills,* 187 Wis. 2d 529, 537, 523 N.W.2d 569 (Ct. App. 1994), *aff'd*, 193 Wis. 2d 273, 533 N.W.2d 165 (1995), *with Wainwright v. Sykes*, 433 U.S. 72, 90 (1974); *Scott,* 230 Wis. 2d at 654 n.7; *State v. Hereford,* 224 Wis. 2d 605, 615, 592 N.W.2d 247 (Ct. App. 1999), he can surely waive the same way his right to wield the sword of appeal, *see generally Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974), and agree not to subsequently attack the conviction to which he has just consented.

Indeed, if a defendant can automatically waive any right to raise non-jurisdictional defects and defenses on appeal simply by entering a plea, *Lechner,* 217 Wis. 2d at 404 n.8; *Kazee,* 192 Wis. 2d at 219, he can expressly waive any right to raise non-jurisdictional defects and defenses on appeal by addressing the waiver in the plea agreement.

Nor is there any other sound reason to prohibit the parties from reaching an agreement which precludes the defendant from appealing since it may be in the best interest of both the defendant and the state to come to an

understanding concerning the final outcome of the case instead of continuing to haggle over alleged errors which might have occurred earlier. *ABA Standards Relating to Criminal Appeals* § 21-2.2, cmt. at 21-24. When a defendant unilaterally decides not to appeal after his conviction he receives nothing in return, but when he agrees not to appeal as part of a preconviction plea agreement he gets some quid pro quo for his forbearance.

Moreover,

> "[t]he settlement of litigation ranks high in our public policy." [Citation omitted.] That view properly applies to criminal as well as civil litigation, particularly in this era of proliferation of criminal appeals, provided always the administration of such a settlement is fair, free from oppressiveness, and sensitive to the interests of both the accused and the State.

State v. Gibson, 348 A.2d 769, 775 (N.J. 1975).

Of course, if the agreement by which the defendant waived his right to appeal prior errors was not reached knowingly, voluntarily and intelligently, the defendant would not be without a remedy. He could always move to withdraw his plea, and appeal from any adverse determination of this motion. *Perkins*, 737 P.2d at 251. *See also, e.g., State v. Rodriguez,* 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998).

Oakley has never claimed that the pleas entered pursuant to the second agreement were involuntary or unintelligent. To the contrary, he affirms in his brief that he deliberately chose to waive his right to appeal the breach of the initial plea agreement to avoid the risk of a harsher sentence if his efforts to enforce that agreement failed. Brief for Defendant-Appellant-Petitioner at 17-18. Instead, he contends that these pleas were void because his

expectations were not fulfilled in violation of his right to due process.

Oakley never presented this contention to the circuit court, however, so he cannot raise it for the first time on appeal. *County of Racine v. Smith,* 122 Wis. 2d 431, 438, 362 N.W.2d 439 (Ct. App. 1984); *State v. Nelson,* 108 Wis. 2d 698, 701-02, 324 N.W.2d 292 (Ct. App. 1982). But in any event, he plainly got everything he bargained for when he negotiated his second plea agreement.

Oakley had no expectation that he would be able to appeal the denial of his motion for specific performance of the first plea agreement. During the plea colloquy, Oakley expressly stated that he understood he was giving up his right to appeal that decision even if the Circuit Court erred in its ruling (R. 23 at 7-9). Obviously then, Oakley had no reason to expect that the terms of the first plea agreement would ever be specifically performed.

A litigant may not attempt to manipulate the legal system by consciously asserting inconsistent positions. *State v. Fleming*, 181 Wis. 2d 546, 557-58, 510 N.W.2d 837 (Ct. App. 1993). So a defendant cannot follow one course of strategy, and if that turns out to be unsatisfactory complain he should be given another chance to pursue a different one. *Cross v. State*, 45 Wis. 2d 593, 605, 173 N.W.2d 589 (1970). A deliberate choice of strategy is binding on a defendant, and a claim of error based on his choice should not be considered by the reviewing court. *State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971).

Oakley deliberately elected to waive his right to appeal the breach of the initial plea agreement. He cannot be permitted to change his strategy now and unilaterally abrogate his second plea agreement simply because he is disappointed with the punishment eventually imposed. *See State v. Nawrocke,* 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995).

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals affirming the judgment and order of the circuit court should be affirmed.

Dated this 5 day of February, 2001.

JAMES E. DOYLE
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523

balistreritj\oakley david\supreme court brief.doc

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 6,602 words.

Dated this 5 day of February, 2001.

THOMAS J. BALISTRERI

SUPREME COURT
STATE OF WISCONSIN

STATE OF WISCONSIN

Plaintiff-Respondent,

vs. Case No.: 99-3328-CR

DAVID W. OAKLEY,

Defendant-Appellant.

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF IN THE SUPREME COURT

KAY & KAY LAW FIRM
BY: TIMOTHY T. KAY
State Bar No: 1019396
COUNSEL FOR
DEFENDANT-APPELLANT-PETITIONER

675 North Brookfield Road
Brookfield, Wisconsin 53045 (262) 784-7110

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

WISCONSIN CASES CITED

FEDERAL CASES CITED

OTHER STATE CASES CITED

ARGUMENT

I. THE RIGHT TO PROCREATE IS A FUNDAMENTAL RIGHT THAT A STATE SHALL NOT IMPINGE UPON ABSENT A COMPELLING STATE INTEREST.

A. IT WAS PLAIN ERROR FOR THE CIRCUIT COURT TO IMPINGE UPON OAKLEY'S FUNDAMENTAL RIGHT TO PROCREATE.

The Respondent ("State") has identified no Wisconsin cases, Federal cases or other state cases that have found that a State may take action that impinges on an individual's fundamental right to procreate. Petitioner ("Oakley"), therefore contends pursuant to the rationale of Zablocki v. Redhail, 434 U.S. 374, (1978), the State action impinging on Oakley's fundamental right to procreate was plain error and therefore should be stricken.

Although Oakley concedes that fundamental rights, such as the right to procreate are not absolute, the State must show a compelling State interest in order to restrict a fundamental right. Pursuant to Zablocki, (supra), the payment of child support, while a substantial interest does not rise to a compelling State interest. Because the condition prohibiting Oakley from procreating unnecessarily impinges on his fundamental right and therefore does not pass strict scrutiny, the State's substantial interest in rehabilitating those convicting of crime is overridden.

Because the right to procreate is as much a fundamental right as the right to marry, and the State may only impinge upon a fundamental right for compelling State reasons and the Zablocki case has clearly established that support concerns of the State do not rise to the level of a compelling State interest such as to impinge on the right to

procreate, it was plain error for the Circuit Court to substantially affect Oakley's right to procreate and that condition must therefore be stricken.

B. IT WAS UNREASONABLE AND UNNECESSARY TO PLACE UPON OAKLEY A CONDITION OF PROBATION THAT HE NOT FATHER ANY ADDITIONAL CHILDREN UNLESS IT COULD BE SHOWN THAT HE COULD SUPPORT THEM.

The State concedes by way of it's Brief that Oakley should be allowed to engage in consensual sexual relations. State's Brief at page 3. However, the State goes on to say that he must be able to show that he can support them. A concession without meaning is no concession. The fallacy in the State's position is easily illustrated. Oakley could take all preventive measures to prevent a woman from becoming impregnated and/or Oakley's partner could take all preventative birth control methods and still become pregnant. Furthermore, Oakley could become employed, thus demonstrating the ability to provide child support and subsequently loose his job through no fault of his own after his partner has become impregnated. Should Oakley under either of these situations be subject to addition imprisonment? Clearly the answer is no. In all of the cases stated by the State from other jurisdictions, those courts have found conditions impinging on an individuals right to procreate unreasonable as being vague and over broad.

In citing the case of People v. Zaring, 10 Cal. Rptr.2d 263 (Cal. Ct. App. 1992) for the proposition that the State has a overriding interest in rehabilitating those who have been convicted of violating the criminal law, the State overlooked the holding in the Zaring case. The Zaring court held:

> "We therefore conclude that whether or not the pregnancy condition imposed in this case may arguably bear upon the rehabilitative purposes of probation, the restriction here is over broad." Id at 270

The customization of the probation condition upon Oakley in this case is therefore irrelevant.

In U.S. v. Smith, 972 F. 2d 960 (8th Cir. 1992) the 8th Circuit reemphasized the holding of the Zablocki court that found that less restrictive alternatives are available to the State to encourage a probationer to pay support. The Smith court specifically found a condition designed to impinge upon procreation to be unworkable. The Smith court stated:

> "A probation condition that requires Smith to find gainful employment and support his children is well within the District Court's authority and, we believe, is more likely to produce the results that the District Court intended." Id at page 962.

In the instant case, had the court placed a condition upon Oakley to obtain gainful employment and support his children upon release, Oakley would have no standing to object. However, the condition impinging on his right to procreate is unreasonable.

The State argues that the condition based upon Oakley to father no additional children unless he can support them as specifically tailored to the facts of his case. However, Oakley has found no case law, State or Federal, which makes it a crime for two consenting adults to engage in procreation. In People v. Dominguez, 64 Cal. Rptr. 290 (Cal. Ct. App. 1967), the California court specifically found a condition impinging on the fundamental right to procreate to invalid. The Dominguez court stated:

> "A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid" Id at 293.

While the no procreation condition arguably satisfies the first element of Dominguez and arguably could restrict the ability of Oakley to be put in the position to fail to pay additional support, the condition itself does not relate to conduct that is criminal. The act of procreation between consenting adults is not a criminal act.

The State relies on State v. Krebs, 212 Wis. 2d 127, 568 N.W.2d 26 (Ct. App. 1997) in support of it's argument that the condition was reasonable. However, Krebs is easily distinguishable. First, as the Krebs court noted, the condition imposed upon Krebs did not prohibit the Defendant's right to procreate. In the instant case, the condition placed upon Oakley does specifically that. Furthermore, the Defendant in Krebs was convicted of sexually deviant behavior in having sex with his daughter. Here Oakley was not convicted of sexually deviant behavior.

Oakley respectfully requests that this court therefore correct the error previously committed and reverse the decision of the Court of Appeals and the Circuit Court denying Oakley's Post-conviction Motion to Strike Condition of Probation and vacate the Order requiring Oakley to show that he can support any additional children should he desire to be a father.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S CONCLUSION THAT THE DEFENDANT DID NOT PRESENT A NEW FACTOR TO WARRANT A RESENTENCING.

At the time of Oakley's Post-conviction Motion and subsequent appeal, Oakley had been placed Out-of-State at the Northfork Correctional Facility in Sayre, Oklahoma. As of the time of this Reply Brief, Oakley has now been returned to the State of Wisconsin and is a resident of the Oakhill Correctional Institution in Oregon, Wisconsin.

III. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DECISION TO GRANT THE STATE'S MOTION TO WITHDRAW THE PRIOR PLEA AGREEMENT WITH THE DEFENDANT.

Although the State claims that State v. Peske, 121Wis.2d 471, 360 N.W.2d 695 (Ct. App. 1984) is legally indistinguishable from the facts of this matter, such is not the case. The Defendant in Peske did not seek specific performance of the plea agreement. Whereas, Oakley did. The Trial Court denied his Motion.

The State concedes that Oakley had the right to have the first plea agreement specifically enforced. State's Brief at page 18. This concession alone reflects that fact that Oakley's subsequent plea was not intelligently made.

Although Oakley concedes that a plea agreement may expressly provide for a waiver of the right to appeal, such waivers are not absolute.

In U.S. v. Ready, 82 F 3rd 551, 555 (2d Cir. 1996) the case cited by the State, the court commented as follows:

> "But no Circuit Court has held that these contractual waivers are enforceable on a basis that is unlimited and unexamined."

In another case cited by the State, State v. Gibson, 348 A. 2d 769 (N.J. 1975), the court commented on oppressive or coercive activities of a prosecutor. The court stated:

> "These views are entirely consistent with the principal that in all phases of plea dealing the prosecutor (a fortiori, the court) may not deal oppressive or coercively with the Defendant, whether in negotiating for a waiver of appeal or for a plea of guilty." Id at 774.

Finally, in People v. Rodriguez, 480 N.W.2d 287, 290-291 (Mich. Ct. App. 1991), the court commented on a situation when a prosecutor fails to uphold it's portion of a plea agreement. The court stated:

> "Agreements that are involuntary or unintelligently made or suffer from other infirmities, i.e., where the court lacked jurisdiction of the Defendant, the prosecution failed to uphold it's portion of the agreement, a claim of ineffective assistance of counsel is made or the sentence of the term falls outside the terms of the agreement or is otherwise invalid, may and should be challenged in the Trial Court". Id at 291.

Oakley contends that the conduct of the prosecutor in revoking it's first plea agreement with him was oppressive and coercive. Under the terms of the first plea agreement, Oakley would have plead guilty of non-support with six counts being dismissed and read-in. Although the prosecutor indicated that the State would allow Oakley to be

placed back in the position of status quo, clearly this was not in Oakley's best interest as the additional six counts would have been resurrected.

Oakley contends that he did the only thing reasonable under the circumstances, which was to try to work out a different plea agreement and then appeal the State's conduct. Oakley's position makes sense from a strategic standpoint and from the standpoint of cutting down the cost of a trial. Clearly the oppressive or coercive conduct of the prosecutor that occurred in this matter was not the type of situation to which an express waiver should be deemed to apply. Oakley should be entitled to revoke his plea and have the terms of the original plea agreement complied with, or in the alternative to have his plea withdrawn.

CONCLUSION

The Court of Appeals committed error when it affirmed the Trial Court's conclusion that a condition of probation that Oakley cannot father any additional children unless it could be shown that he could support them was reasonable. The Court of Appeals committed further error in affirming the Trial Court's decision denying his Motion for Re-sentencing in light of new factors. Lastly, the Court of Appeals erred in denying Oakley the right to withdraw his plea or to be re-sentenced in accordance with the first plea agreement.

Respectfully submitted:

Dated this 16 day of February, 2001.

ATTORNEY FOR APPELLANT

Timothy T. Kay
State Bar No. 1019396

PREPARED BY:
KAY & KAY LAW FIRM
675 North Brookfield Rd.
Brookfield, WI 53045
(262) 784-7110

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 2,276 words.

Dated this 16 day of February 2001.

Timothy T. Kay
State Bar No. 1019396